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1871  
1872









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LAW REVIEW;

OR,

*Quarterly Journal of Jurisprudence.*

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# INDEX TO VOL. XII.

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- Affair of the Trent, 324.  
Ancient Irish Conveyancing, 246.  
Belligerent Rights at Sea, 81.  
Extract of a Letter from Lord Brougham to the Earl of Radnor, 75.  
Events of the Quarter, 191, 387.  
Inner Temple Benchers.—Disbarment of Edwin J. James, Q.C., 263.  
International General Average, 224.  
Journal of a Gloucestershire Justice, 99.  
Jurisprudence at Dublin, 1.  
Martial Law in Australia, 170.  
Practice of the Divorce Court, 355.  
Religious Trusts, 23.  
Rights, Disabilities, and Usages of the Ancient English Peasantry,  
259.  
Sir John Patteson, 197.  
Reviews ; Constitutional History of England, 60.  
Disunion of the United States—Right of Secession, 359.  
Law of Nations, 127.  
Rules of Evidence, 44.  
Sugden on Powers, 286.



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ART. I.—JURISPRUDENCE AT DUBLIN.

THE Association for the Promotion of Social Science held their fifth Congress this season in Dublin. As on other occasions, their venerable President was accompanied to the place of meeting by several men of illustrious rank in various departments of jurisprudence, whose presence added distinction to a forum devoted to calm and beneficent discussion. It is curious that, during his long career, Lord Brougham had never before visited a country with which his triumphs and friendships had been happily and intimately associated; and that this was the first occasion on which the undaunted champion of the Catholic claims, and the fellow-labourer of Grattan and Plunket, had set foot on the soil of Ireland. But, though long delayed, his visit to Dublin was welcomed by men of all orders and parties; and whether at the Viceregal Court, or at the civic festivities of the Mansion House, or in the halls of Trinity College, which enrolled him among her intellectual brotherhood, or within his peculiar and chosen sphere, as directing the Congress in its various sections,



he was always greeted with affectionate enthusiasm. Though not quite so numerously attended as last year, the Dublin meeting was very successful as regards the general interest it caused among Irishmen of the educated classes, the list of cultivated and gifted minds it brought within the ranks of its associates, the very valuable and animated discussions on various topics of Social Science which arose during its brief sittings, the fruitful stores of thought and information which it made current in the course of its progress, and the many plans and hints of reforms, of course of different degrees of merit, which it circulated in reference to the subjects it dealt with. In short, notwithstanding the numerous sneers with which the Association has sometimes been met, they may fairly boast that they have taken root in public opinion wherever they have tried it; and when we enumerate the admirable results in many provinces of social economy which may be traced directly to their exertions, as well as the many useful suggestions which statesmen and jurists have found in their debates, we may smile at the silly cynics who attempt to detract from their varied and valuable labours.

Our object, however, is less to write an account of this meeting in all its details, than to notice its treatment of general jurisprudence—as Lord Brougham remarked, its most important subject. The place, the audience, and the participants in the debates, concurred to give a peculiar prominence to this great branch of Social Science at the recent Congress of the Association. The immense changes in the law of Ireland which have taken place in this generation, and have made that law in many respects completely different from that of England, led to much comparing of the two systems, and many discussions as to their merits, in an assembly numbering among its members several leaders of the Bar in England and Ireland. The President especially courted inquiry in reference to those parts of Irish jurisprudence which are not fashioned on the English model,—as, for instance, the operation of the Landed Estates Court, and of the tribunal which it originated; the

system of Crown prosecutions in Ireland, and even her Law and Equity procedure;—and as eminent members of the Irish Bar took pains to answer his questions fully, and to canvass these legal topics minutely, an extraordinary amount of valuable information was disseminated upon this important subject. Besides, the members of the Irish Bar, as a matter of course, attended this meeting in greater numbers than on previous occasions; and the presence of a body which, as a whole, is the most cultivated order in Irish society, enhanced the dignity of a department which appeared specially dedicated to them. There was something, too, in the genius of the scene—the noble temple of the Four Courts made celebrated by several generations of worthies conspicuous in the senate or the forum—which tended to render inquiries and debates on questions connected with jurisprudence remarkably attractive to a general audience.

Lord Brougham inaugurated the Congress by an address delivered at the Mansion House in Dublin. Very different from his speeches in Parliament or at the bar—so close to the point and vehement with passion, although somewhat diffuse in language—this fine dissertation is a good specimen of that *copiose loquens sapientia* which Cicero has called the perfection of eloquence. It reviewed at length and with much brilliancy the progress of the Association in the various ranges of Social Science which it makes its province, enjoining in kindly and feeling tones the necessity of exertion among younger members in seeking to attain the common object. We transcribe a part of its allusions to jurisprudence:—

“The most important of all our departments, unquestionably, is the first—that of jurisprudence; and here we have not to report a great number of measures recommended at our former meeting, and adopted by the Legislature, but those which happily have been approved and passed are of very great moment. An elaborate report, with suggestions on the Patent Law, and the reports on private bill legislation, have as yet borne no fruit. But the important propositions respecting

charitable trusts, made by our learned and distinguished colleague, Sir W. Page Wood, have to a great extent been adopted by the Education Commission, under the Duke of Newcastle; and the amendments of the bankruptcy and insolvency laws which, after the fullest investigation, we so strongly recommended, have almost all been introduced into the new Act, the careful framing of which reflects the greatest credit upon the Lord Chancellor. It has not passed through the ordeal of the Lords without material changes; but it is an important amendment of the law. Great complaints were made at the last Congress of the manner in which the time of the Legislature was consumed, almost to waste, by endless and useless debate in one of the Houses; and the worst consequence of this was felt and deplored in the loss of the bills for the consolidation of the criminal law. Although it cannot be with truth affirmed that the grounds of the complaint are removed, yet they have been somewhat lessened during the last session; and certainly there has been the most satisfactory change in the manner of dealing with these important consolidation bills—a change which may, in part at least, be ascribed to the effect of our remonstrances. The wise resolution which we strongly urged, supported by the high authority of my esteemed friend, Lord Lyndhurst, has been adopted, of taking upon trust the project framed by learned and skilful persons, and examined by a committee of the Lords; and thus five Acts have been passed containing a digest of the main body of the criminal statute law. That there is no other conceivable means of attaining this great object has long been the opinion of practical lawgivers, and, after it had so long been rejected by the Legislature, it is gratifying to reflect that the labours of this Association have contributed to its adoption. Nor can any gain to our jurisprudence be more important both in itself and as leading to a digest of the law in all its branches; for nothing can more directly tend to its improvement in every way. But furthermore, it is confessed on all hands that the subject has an

indisputable right to protection in return for his allegiance, nay, as the very condition of his allegiance. Yet involved in this is the right to be made acquainted with the laws under which he lives, and submission to which his allegiance implies. But the ancient tyrant who placed his laws at such a height that the people could not read them, hardly did a worse act than they who so wrap them up in vague language, and so mix and confound their provisions, that when read they are not understood. Happily, there is now an end to this grievous defect in our system, a certainty of having a digest, which for many years was beyond my most sanguine expectations, when the labours of those to whom nearly thirty years ago I committed the consolidation, giving us most valuable reports, seemed doomed to disappointment by the course pursued by the House of Commons, and would have continued ineffectual but for the exertions and the influence of the National Association. Let us, however, hold in grateful remembrance the invaluable services of Messrs. B. Ker, Starkie, Greaves, and Lonsdale, towards the success of this great work. We may now hope to see the expectation of our learned colleague, Sir F. Kelly, fulfilled, who in his repeated attempts at consolidation, and in presenting the ably-framed bills which he successively brought in, calculated upon the number of statutes which they embraced, and saw good reason to believe that he would reduce the forty volumes now filled by the statute law to four. His services have not been confined to this branch of jurisprudence. In two succeeding sessions he introduced a most important bill for removing the defect of our law as to wills of British subjects executed abroad, and it passed the Commons both times, but fell through in the Lords. Lord Kingsdown's bill, now passed with the same object, though less extensive than Sir. F. Kelly's, removes a great part of the defect complained of. Finally, a most important Act has been happily passed, and with less difficulty than our excellent colleague, Mr. Villiers, its author, expected, reducing the time of gaining settlement from five to three years, extending the

required residence over the whole union, and distributing the payment of rates more justly and equally. We may congratulate our colleague on a measure which will in all probability be followed by others to remove the whole defects of the settlement law. It is very unfortunate that the lamented death of his brother, the Bishop of Durham, deprives us of his attendance at the Congress. In this department of jurisprudence we must record a very important statement and motion of our colleague, Lord Clanricarde, upon Irish judicature and judicial procedure, in comparison with the English, and he has since extended it to proceedings at sessions. A commission was appointed in consequence; but independent of all inquiry, and whatever legislative measure may be its result, it was manifest that the department of judicial statistics, which was established in England with so great advantage to the progress of our legislation, might be extended to Ireland; and having offered this suggestion, which the noble marquis entirely approved, I have had the satisfaction of learning that the Government lost no time in acting upon it, to the great benefit of our judicial system."

As President of the Department of Jurisprudence, Mr. Napier delivered an able address, which attracted a large and gratified audience. This address was remarkable for the elegance of its style, and the sanguine hopefulness of its tone in reference to the important subject of digesting the mass of our statutes and decisions into something like a reasonable compass. It observed justly, that while law reform had been going on in the three kingdoms with great and unexampled activity, no care had been taken to guard against the conflict of laws which had been the result; and, consequently, that while our national intercommunications had been growing more close and frequent, our general jurisprudence was becoming more diversified, and was breaking into discordant systems. As we shall show hereafter, we differ widely from the views urged by Mr. Napier in this address in reference to

the Law of Marriage—a subject on which he commented at length; but the following remarks on the good policy of having a general department in the State devoted exclusively to law reform deserve attention, and, we think, commendation.

“ In the session of 1857, an address to the Queen was presented by the House, to which a gracious answer was promptly sent by Her Majesty, which led us to expect that a department of administration for the affairs of public justice would soon be constituted. The importance of such a department has grown into a necessity, and after the repeated conferences which I have had with statesmen and jurists, and the suggestions which I have received from those who have given to the subject the thought which it deserves, I feel myself warranted in saying that such a department might be constructed at any time, in complete consistency with the prerogative of the Crown, the precedence of the Lord Chancellor, the independence of the judges, and the privileges of Parliament. It is competent to the Crown to appoint a Committee of Council for the affairs of public justice. There is a committee for trade, another for education, and a judicial committee. Over the new committee, the Lord Chancellor, as the great minister of justice, would properly preside, in the absence of the President of the Council. The Chancellorship of the Duchy of Lancaster might remunerate a vice-president of the committee, whose undivided attention might be given to jurisprudence and the amendment of the law. By an order in Council, business relating to the affairs of public justice might be referred to this committee. It is now generally allowed that it is needful to collect, register, and digest the results of experience as to the working of the law; and, therefore, judicial statistics should be periodically collected by, and recorded in, this department. These would be obtained from the several courts of justice, and might be accompanied by such remedial or other suggestions as the judges or officers of these courts might think fit to add. Defects in the law would thus be

disclosed, remedies would be discovered, obscurities arising from imperfect legislation (which under the present system rather provoke satirical exposure than induce remedial comment) might hereafter be noticed for the plain purpose of prompt amendment. The course of judicial decision might be followed, and when its authority might seem questionable, either from a conflict of judicial opinion, or the disapproval of the profession, or when it would be found at variance with the known intention of the Legislature, or the current opinions of some class whose interests were specially involved,—in these, and like cases, the attention of the committee would be directed to the subject. It would also, from time to time, be directed to the digested results of the statistics obtained from the courts, and would be enabled at stated intervals to make a report to the Crown on the state of the law as administered by the courts, and lay the foundation for such remedial measures as the Government would then feel it their duty to submit to Parliament. Remedies would thus be the more likely to be appropriate, to be prompt, and would be proposed with authority which might commend them to notice and acceptance. Great injustice is often caused by the delay in amending defective legislation; and not less, perhaps, by leaving doubtful decisions of the courts, with just enough of authority to enable them to perplex or mislead, but without enough to save them from ultimate reversal. The changes which take place in modern society, by reason of its increased activity, the employment of capital, and the energy of commerce, the innovations in our system of law occasionally made by novel legislation, present to our courts questions to be solved which are in a great degree of ‘first impression.’ This brings forth conflicting decisions; private litigants may not be disposed to incur the risk of having the law settled by the House of Lords; until it is so settled, the law on the subject is in abeyance, and when it is settled what the law is, the secret may then be found out that it is not what it ought to be. The public may thus be long embarrassed by imperfect

legislation or apocryphal decisions which usurp the rightful authority of plain, positive law. Indeed, this opens a large question as to the reporting and the revision of judicial decisions, when regarded, not simply as the adjustment of private controversy, but as they affect the general law, and the interests of the community. It is a public necessity, I think, that the present system of irresponsible reporting, and the reviewing of decisions, which, from time to time, when they are published, have the sanction and force of positive law, should undergo a searching scrutiny. Definitions, principles, and feelings, should not be added to the stock of our jurisprudence unless they be supplied by accredited authority."

The papers read in the Department of Jurisprudence, and the very interesting debates they occasioned, besides being in many instances exceedingly instructive and full of thought, were, we think, of this peculiar advantage, that they placed in a clear and striking light the great diversity in the municipal laws at present in force in the three kingdoms, and pointed out the absolute necessity of removing this as far as possible. In judging of the merits of these different codes, it is certain that each has special excellences which it may communicate to those of its neighbours, and is also open to several objections from which the others are comparatively exempted. The Law and Equity Procedure of England, and indeed all its laws of practice, are very superior to those of Ireland, which appear to us expensive and cumbrous, and are so loose and devoid of method, that a reform here is absolutely needful. Of the laws of marriage in the three kingdoms, that of England alone is tolerably rational, those of Scotland and Ireland being a reproach to any jurisprudence of the nineteenth century, as was noticed in our preceding number. The recent English statute of bankruptcy—many clauses of which are really due to hints given by the Council of the Association—will probably prove a much better measure than the parallel Scotch and Irish codes; and the county court system existing in England is better, we think, than its Irish



prototype. On the other hand, in the Landed Estates Act, and the court which has carried out its enactments, there exists in Ireland a machinery for conveyancing, unrivalled for its facility and cheapness, which has made the transfer of land in that country, from having been a disgrace to the law, a pattern for legislation to adopt, and which, we think, should become the basis of a similar reform throughout the empire. Moreover, the system of public prosecution is much better in Scotland and Ireland than that now existing in this country ; and perhaps the criminal law of England might receive some benefit from the admixture of some principles of the Scotch procedure. Our preconceived ideas on these subjects, which formed the principal topics of these discussions, were much strengthened from all that we heard advanced or canvassed in the department ; but, as our limited space forbids us to give our reasons for all these conclusions, or to analyze all the arguments for them, we confine ourselves to two points only—the Landed Estates Act, and the Law of Marriage,—inasmuch as, of all the questions debated, these appear to us of the greatest importance. In reference to the first of these subjects, a paper combining statesman-like sense with a just appreciation of the true principles which should govern the law of real property, was read by the Solicitor-General for Ireland. Its account of the operations of the Landed Estates Court is very interesting and instructive :—

“I purpose now to show that we have in this country a cheap and effectual mode of transferring land with secure title, without interfering with the present exercised dominion over the land. The operation of the Incumbered Estates Court, or, as it is now called, the Landed Estates Court, is simply this—it investigates title, and pronounces judicially upon it; and, having satisfied itself that a good title exists, it gives to a purchaser an indefeasible title. If no such court existed, an investigation would take place upon every sale or conveyance; but the result arrived at would be uncertain, and not binding upon any person ; nor would it dispense with the repetition of

the same operation upon another sale. Is there anything unreasonable or unjust in this law? It is the creation of a tribunal empowered to decide upon a question of law, viz., who is the owner of an estate. The law which raises the question also solves it. It is now ascertainable as a matter of fact whether this has been done effectually, and without injury to private rights. The jurisdiction was, as is well known, originally created in order to sell incumbered estates, they being unsaleable by the ordinary means in consequence of the state of this country in the year 1848; and in the first stage of the proceedings of the Court, petitions were, for the most part, those of incumbrancers. Gradually, the proportion of owner's petitions increased, and we find that the entire number of petitions presented from the commencement to August, 1858, when the Incumbered Estates Court was changed into the Landed Estates Court, was 4,413. Of these 800 were supplemental, withdrawn, and dismissed petitions—in all 3,613; of which the number presented by owners was 1,363; and of the first 100 petitions only six were presented by owners. The commission was originally only for five years; it was extended from time to time; and in 1855, when the Court had been seven years in operation, a commission was issued by the Crown to inquire whether it was expedient that this should be made permanent. It appeared before that commission that owners actually created incumbrances upon their property in order to be able to sell it with a parliamentary title. There was obviously no reason why favour should be shown to an incumbered proprietor more than to an unincumbered, and therefore the commission reported that the jurisdiction should be extended to all estates sold under the Court. That report also recommended the giving of this jurisdiction to the Court of Chancery, and the introduction of certain reforms in that Court, which have not yet been carried out by legislation. The Landed Estates Act (21 & 22 Vict. c. 72) altered the name of the Court, made it permanent, and gave it jurisdiction to sell estates whether incumbered or

not. It also enabled an owner of an estate, although he did not want to sell, to obtain a declaration from the Court of indefeasible title; and that Act, for the first time, imposed a duty upon estates brought into the Court of 10s. per cent. when the value was less than £10,000, and £1 per cent. when it amounted to or exceeded £10,000. It seems both unjust and impolitic to render a large estate subject to a greater percentage of duty than a small one. It is opposed to the analogy of other Acts. For instance, in the Succession Duty Act the percentage is uniform, no matter what the magnitude of the estate may be. There is no doubt that this checked very much the operations of the Court, and, the matter having been complained of, it has been amended by an Act of this session, which imposes an uniform duty of 10s. per cent. on all estates. I give now a statement of the amount of duty received from the commencement of the Landed Estates Court to the 1st August, 1861, by which it appears that the total was a sum of £11,270 13s. 6d. for the two years and nine months ending the 1st August, 1861. The amount of business transacted in the Incumbered Estates Court from its commencement to its close was as follows:—Petitions, 4,413; absolute orders for sale, 3,547; number of conveyances executed, 8,364; number of Irish purchasers, 8,258; number of English, Scotch, and foreign purchasers, 324. Gross proceeds of sales, £23,160,000; of which was paid by English, Scotch, and foreign, £3,160,000, leaving £20,000,000, representing Irish capital invested in the land. Number of Chancery suits stopped, 1,298. All these funds were distributed. I now give a statement of the amount of business done\* from the commencement down to August, 1861, which has been supplied to me by Judge Longfield's examiner, from which it appears that 1,945 petitions were filed, 1,213 titles read, 1,121 estates sold for £12,324,977, 1,045 schedules filed, and £12,103,806 paid out, &c. The next question of interest is, what has been the expense of these operations? I annex a statement of the costs, furnished from

\* *I. e.* in that Judge's Court alone we presume.

the taxing officer, which shows an outlay on that account of £813,797, including the costs of surveying and advertising. The costs vary very much, as will be seen by a table taken at random; but the average of the costs are about £3 10s. per cent. on the purchase money. This is rather above than below the amount, as will be seen by the tables. But the greater part of these costs are not properly legal costs, but costs of surveys, valuations, printing, and advertisements, which form about 30 per cent. of the costs of sale. I annex a table showing, in a number of cases, the proportion of costs of advertising to the legal cost of each, from which it appears that in some cases it reached a sum of upwards of £23 per cent., whilst in one case it was so low as 7s. 2d. per cent. Excluding the costs of advertisements, the legal costs could not be more than two per cent. on the purchase money, and according as the system extended, and the Court becomes the medium for carrying out contracts of sale, this item of expense will be reduced. When the property has been once sold under the Court, the costs of a resale will be much less, for there will be no searches or investigation of title anterior to the conveyance of the Court. The result of the entire operations of the Court has been, that there is a parliamentary title established to about\* 3,200,000 statute acres of Ireland, or about one-sixth of its area; and a sum of £28,000,000 of purchase money has been distributed."

The real characteristics of the Landed Estates Act are, that it enables a court of justice to act *in rem* on property in land, to gather within its own sphere all rights annexed to an incumbered estate, to transfer these to the fund for which it is sold, and to convey away the land to a purchaser, with a title which cannot be brought into controversy. Such powers were unknown to equity jurisprudence; and the Court of Chancery being unable to deal with land, except *in personam*, was and is

\* This is a mistake, arising from not taking into account the different interests sold in the same land. The amount of land sold is about one-half that stated.

compelled, on any attempt to sell it, to bring all the parties before its tribunal to adjudicate on their conflicting claims before making any decree for sale, and then merely to join in the transfer, having no capacity to give a title. In the state of Ireland in 1845-50 the results were fatal to any estates which were within the jurisdiction of the Court, and have, therefore, made it exceedingly unpopular. Still, we firmly believe that if the powers at present enjoyed by the Landed Estates Court were given to the Court of Chancery in Ireland, and a sound reform in its procedure accomplished, we should see the ancient and more constitutional tribunal work fully as well as its modern supplanter in reference to the sales of estates, transfer land as cheaply and expeditiously, and give equal satisfaction to the public. We certainly advocate trying the experiment of merging the Irish Landed Estates Court in Chancery, annexing to the latter the jurisdiction of the former, and of thus assimilating a new discovery to the organic structure of our regular jurisprudence. A reform such as this would attract to a Court, emphatically that of equity and conscience, a great deal of public confidence; and possibly it would dispense with the necessity of filling one or two judicial offices in Ireland—a matter, in these economic times, not altogether undeserving of attention.

The papers read on the laws of marriage, and the very interesting discussion they provoked, attracted, perhaps, more general notice than any other subject in the department; by reason partly of the anomalies of these laws as at present existing in Scotland and Ireland, and partly of the remarkable illustration they have lately received in a celebrated trial. A Scotch lawyer, Mr. Campbell Smith, maintained the cause of his national law by the arguments usually adduced by his countrymen; and, in principle at least, he found a supporter—most unexpected by us we own—in no less a person than Mr. Napier, who virtually contended that the power of the State did not extend to the contract as such, and, therefore, of course, that mere consent was in all cases the only constituent the law

should recognise of the marriage relation. We quote a passage containing these views:—

“ Look at what we call our marriage law. You may search for it in the lumber room, amongst the rubbish of Acts of Parliament, Irish, English, and Imperial. Thoughtful men ask themselves at last, Is marriage, indeed, to remain an institution of God, or has it become the creature and convention of human law? It is, doubtless, of Divine appointment, as Lord Stowell has said, in language eloquent as it is exact:—‘ It is the parent, not the child, of civil society.’ The relation of husband and wife is constituted—completely and irrevocably constituted—by the free consent of parties competent to contract, and intending, by such consent, to constitute the relation. The positive law of man cannot make more or less perfect the appointment and institution of God. It has been said, but loosely said, by great authority, that society is a party to the contract; it would be more accurate to say, that society may have an interest in its completion. In this day of religious liberty, parties competent to contract and constitute a marriage ought to have the free choice of having that marriage solemnized by such religious sanction as they may think fit to select and superadd. Marriage is *publici quia Divini juris*; it is valid everywhere, if valid anywhere. Why is this? Because it depends not on the position or local law of man, but on the appointment of God, for the whole human family. In a Christian State it is acknowledged to be the symbol of a mystery—the union that is at once indissoluble and divine. It was reasonable to require publicity in the title to dower, or to the inheritance of landed property, and in other like cases the interference of positive law is, at least, intelligible, and when rightly understood, is found to belong to the law of property, not to the law of marriage. If, indeed, our laws of property were cleared of all obsolete feudalism, simplified and consolidated, then what is called the marriage question would solve itself. The State may regulate the enjoyment of property in whatever way, and upon whatever condition the general interests

of the community may reasonably require ; but when it proceeds to annul a marriage, because some conventional rule has not been observed, I am bound to declare that it exceeds its jurisdiction. Irregular and clandestine marriages, as they are called, deserve to be denounced, and ought to be discouraged by every branch of the Christian Church, and the more so as human law cannot directly deal with them. We must look to a moral remedy for moral evils, to the preventive influence of parental and pastoral care, religious training, and the restraint of improved public opinion. Where the State moulds the laws of property for the convenience of the community, it may justly require, as a matter of sound policy, that every marriage which can claim to be recognised for property or other civil privileges shall have had such sanctions superadded, and been publicly recorded in such form, as the interest of society may demand for its common convenience. Nothing more than this should be required. But this, be it observed, would be a part of the law of property ; it leaves the law of marriage as God has left it—sacred and universal. This view is, I think, in harmony with the spirit of our ancient law.”

The true principles of the law of marriage were, we think, laid down in opposition to these views by Dr. Waddilove and Mr. Morris, of the English and Irish Bar respectively. These gentlemen concurred in pointing out the ruinous effects of the Scotch system, and the vices inherent in the Irish law ; and they agreed, moreover, in recommending the application of the English marriage law to all parts of the United Kingdom. Mr. Morris’s paper attracted much attention, in consequence of its concise summary of the lamentable operation of the Irish law, and also because it described the results of the conflict of the laws of marriage in the empire in a clear, simple, and popular manner. Adhering steadily to what we believe is the only rational doctrine on this subject, Mr. Morris insisted on the right of the State, in the interest of society in these kingdoms, to attempt to substitute some uniform plan in reference to the relation of marriage, for the chaos of customary and statute

laws which at present endanger and perplex this contract ; and, following the views of the ablest jurists, he contended that such a plan should provide, so far as law could secure this object, that the marriage contract should be deliberate and public ; should be freed from harsh and obscure conditions, and above all should not be beset by collateral, intricate, and latent impediments. We transcribe that part of Mr. Morris's paper, which refers to the law of marriage in Ireland, the rather as it is absolutely necessary to direct attention to its numerous mischiefs:—

“ The Irish marriage law chiefly depends upon the 7 Vict. c. 81. Under this measure the Established Church and the civil registrar of the State are the only general agents to carry out the contract between all classes of persons, without regard to religious distinctions ; that is, functionaries who have no influence over five-sixths of the Irish nation are made the sole depositories of the power to marry them with complete safety ! Presbyterian clergymen, under certain restrictions, are enabled to solemnize valid marriages when both or one of the parties is Presbyterian—thus making the latent accident of creed a condition to the security of the contract, which is scarcely protected by a doubtful proviso ; and other nonconformist Protestant marriages may be celebrated, as they are in England, by nonconformist ministers and registrars, the only difference being that the forms are rather humiliating, and even insulting. All these marriages, which, be it observed, are probably not one-fourth of the whole, must be registered in a uniform system ; while as regards Roman Catholic marriages, that is, those of three-fifths of the nation, they remain on the discreditable footing on which they were left before the Union. Now, as in the days of the Penal Code, the marriages of Roman Catholics in Ireland may be celebrated at the option of the parties, at any hour, without notice, without a witness, by any word, and without a single record to attest them ; although it is due to the priesthood to say that they do, for the most part, observe these requisites. At the same time, the old



restrictions are still in force upon this body. They may marry their own co-religionists as they please, but if they attempt to solemnize a union, when one, or both of the parties is Protestant, or has been so within twelve months, the whole proceeding becomes a nullity. Within a boundary which eludes observation, the contract is most dangerously loose; without it, however solemn it may have been, it is legally a mere nonentity. This, then, is the law of marriage in Ireland, excepting only that mere marriage contracts have been done away with, as a bar to invalidate regularly solemnized unions. We need not say that, viewed as a whole, that law is at issue with all sound principles. As regards Roman Catholic marriages—that is, those of three-fourths of the nation—they may be as hasty or clandestine as Scotch marriages at Gretna Green, and no public register attests them. Deliberation, therefore, and publicity may be entirely wanting in these unions, defects which, of course, are an evil in themselves, and very perilous to other marriages. The conditions of marriage are thus obscured, while as regards Presbyterian marriages and those of other sects of Protestants, they are very harsh and difficult of discovery. How is a person not a Presbyterian, who marries in a Presbyterian chapel, to ascertain the Presbyterianism of the co-contractor, and why should a Baptist and a Wesleyan be compelled to marry by a notice at the poor-house? And lastly, every marriage in Ireland is exposed to a series of latent impediments which very possibly may elude inquiry. Any marriage celebrated in the Established Church may be set aside by a secret ceremony performed before a Roman Catholic priest, if both the parties can be proved to have been Catholic. Any marriage celebrated in the Roman Catholic Church is avoided if one of the parties can show that at the time, or within twelve months, he or she was a professing Protestant. And any marriage in the Presbyterian Church may very possibly depend on the fact, that one or both of the parties at the time was or were Presbyterian Protestants. I think I may say that a code such as this,

which divides itself into obscure privilegia, according to sectarian distinctions, which gives a latitude to one class of marriages which are a serious evil in themselves, and places a fetter on other marriages from which they certainly should be free ; which is so lax that it encourages seduction, and so intricate that it endangers matrimony, and which sets in hazard the greatest of contracts, by reason of undiscoverable connexions, of facts really collateral and immaterial, and of unintelligible and treacherous provisos, requires a thorough and speedy amendment."

Mr. Morris thus noticed the results of the conflict of our marriage laws:—

"A volume might be written on this topic ; so I confine myself to two particulars, which appear to me especially mischievous. It is surely a great national evil, that what legally constitutes a marriage should be different in various parts of the empire ; that between three nations locally intermingled, and cemented by a thousand links of union, the law of marriage should be a Lesbian rule, which shifts according to the circumstances of place ; and that acts which in England would be absolutely null may be binding marriages in Scotland and Ireland. This medley of jarring rights reminds one of the observation of the Athenian orator, 'that a faulty law, if fixed and uniform, may be better than a wise one which is partial in its working ;' and I need not here dilate on its mischiefs. Again, it is a result of this conflict which divides Great Britain into three regions, in which marriage is differently defined, that even within these regions severally the law of marriage is not uniform. For, since with this, as with other contracts, the *lex loci* governs marriage so far as concerns the external forms, and since English, Scotch, and Irish marriages are therefore valid in all parts of the empire, it follows that, in each division of the empire, the status of persons and title to property may be affected by a law of marriage to which its own is completely repugnant. A marriage in Ireland celebrated by a friar without notice, or

a single form, may transfer the honours of the House of Howard; and we all know since the 26 Geo. II., and even since the 6 Will. IV., that English titles and estates have devolved upon the issue of Gretna Green marriages, that is, of unions condemned by English law, yet operative within the English jurisdiction. The result is, that the law, as a whole, is not only split into discordant systems, but that each of these systems encroaches on the other, and makes the entire a scene of uncertainty."

As regards Scotch irregular marriages, Mr. Morris maintained that they should be abolished, or, in the case of non-Scotch subjects who come within the Scotch jurisdiction, that they should not have a matrimonial character unless a residence of some months in Scotland had given the parties notice of their danger. And with respect to the Irish marriage law, he contended for its assimilation with the English, with this exception, that an officer of the State should in all cases be present at the rite, allowing the clergy of every denomination to clothe the contract with a religious sanction according to the forms of their respective Churches.

Our own views on this subject are known, and this is hardly the place to discuss them. In common with every jurist of weight—with Sanchez, (7 Disp. 3, vol. ii.,) who expressly admits the title of the sovereign to legislate on this subject; with Pothier, (vol. iii. Part I. cap. 31,) who affirms that, "like all contracts, that of marriage is under the secular power;" and with D'Aguesseau, (vol. v. 82,) who defines this contract as "an act of society to which the law of the commonwealth attributes certain effects,"—we hold that the State, for the public interests, has a complete right to lay down conditions which must be observed to constitute marriages, and even must do so to protect society. Mr. Napier's doctrine—we say it with respect, but not the less with the fullest conviction—would lead, if pushed to its logical consequences, to the utter subversion of the matrimonial relation, and, in any case, would tend to social confusion. If he means that the mere volition

of the parties is to be the determining test of marriage, what right has he to object to polygamy, to divorce, on the ground of incompatibility of temper, or to incestuous unions of every description? Or, if he means, as he probably does, that the Mosaic law is to be the standard to which civil society should conform in reference to the relation of marriage, this still leaves the whole subject open to many embarrassing and difficult questions which absolutely require the State to solve them. For instance, if our law of marriage is to be that shadowed out in Leviticus, we ask, is it to be left to the parties to fix the age for the capacity to contract, within what degrees, beyond all doubt, is the prohibition of affinity to operate, and what kind of divorce is allowable or sanctioned? Such points, we think, should not be left "to the free consent" of the parties to settle; and besides the making "free consent," in accordance with the Mosaic law the only essential requisite of marriage, Mr. Napier necessarily would expose society, in its actual organization and condition, to all the perils and scandalous mischiefs of frequent clandestine and bigamous unions. Were this principle the only rule, we should like to see how he could protect us from the every-day recurrence of such cases as those of Dalrymple, Wakefield, and Yelverton.

The truth is, that Mr. Napier ignores a very obvious distinction in the observations we have just quoted. As between any given man and woman, consent may be the only condition required to make a marriage agreement; but, to give this the status of matrimony, the State, for the good of the commonwealth, may well superadd conditions of its own, which, if unobserved, preclude the agreement from having a matrimonial character, so far as municipal law regards it. The same principle which, in the interest of society, refuses to enforce an agreement for a sale unless it be clothed in certain formalities, while, as an abstract and moral question, it fully recognises the existence of a contract, may equally decline to acknowledge mere consent as entitled to constitute marriage *per se*, although it may hold that such a contract is binding on the parties in

point of conscience. This plain distinction, which, in every jurisprudence, exists for the general good, appears to have been confounded by Mr. Napier, and this has led him into erroneous views in reference to this important subject. Lord Mansfield has stated it very clearly when, in the debates on Lord Hardwicke's Act, the right of the State to legislate on marriage was denied by one or two of his contemporaries.\* "It is objected we are doing what we have no power to do; to declare that to be void which is valid by the law of God and nature. Sir, we are only to declare a marriage void *in law* which is not contracted according to the forms prescribed by society, and this is what every society may do, and has done in a multitude of cases. Our statute of frauds is an instance of this, and every statute we have made for the limitation of actions is an instance of it."

This debate on our marriage laws, opened as it was by papers of sterling merit, and aided by the experience of more than one distinguished lawyer, is a good sample of the way in which the Association clears the path for legislative improvement, and instructs the public in the laws under which they live. We have not space to notice other topics fully deserving attention; such as the report and resolutions of the Patent Law Committee, since read (by leave of the Council) to the meeting at Manchester, and there originating a valuable discussion; and such as the useful contributions to our knowledge of the practical working of the bankrupt laws in the three kingdoms. We have only in conclusion to wish the Association good speed in their beneficent progress, and to express a hope that in all their departments their labours will prove as practically useful as they have proved in that of jurisprudence.

\* It may be added that it is rather singular that Mr. Napier's view of this subject was urged by Henry and Charles Fox, two of the least religious men of the day, our view being insisted on by Burke, assuredly not an enemy to religion.

## II.—RELIGIOUS TRUSTS.

**S**INCE our last publication, the period allowed by the Act of 1860 for the enrolment of Roman Catholic trust deeds—viz., a year, ending on the 28th August, 1861—has expired, and has, to a very great extent, been taken advantage of for the enrolment of such deeds. The Act of last Session, (24 Vict. c. 9) entitled, “An Act to amend the Law relating to the Conveyance of Land for Charitable Uses,” made further provision for the enrolment of trust deeds, where the deeds declaring the trust are separate from the deeds conveying the property; allowing the former only to be enrolled; and, as to past deeds, allowing for enrolment a year from the 17th May last. The occasion seems opportune for taking a review of the jurisdiction of Chancery over such trust deeds and of the advantages offered by the jurisdiction of the Charity Commissioners. Beyond all doubt, these religious trusts are by far the most important of charitable trusts, and excite the deepest interest among all classes; and the principles on which the Court of Chancery exercises its jurisdiction have been long well settled, on grounds equally and impartially applicable alike to all.

It may be proper to premise a few words as to what are religious trusts within the jurisdiction of Chancery, or of the Commissioners of Charity. The former includes all endowments for the support of churches or chapels, or places of religious worship or education, and also for the support of ministers of religious worship or education of any religious denomination—Protestant or Roman Catholic, Christian or Jew, Episcopalian or Dissenting, Church of England, Independent, Wesleyan or Baptist. All colleges for the training of ministers of religion of any denomination are likewise included; and in some cases Roman Catholic convents may

possibly be within the jurisdiction. As to charitable trusts for the use and benefit of their inmates, when there is something charitable, either educational or eleemosynary, connected with the institutions, then, as regards the jurisdiction of the Commissioners of Charity, it embraces all endowments within that of Chancery, save so far as they are expressly exempted—as the universities or buildings registered for religious worship—the latter exemption not extending to endowments for the support of ministers of religious worship, or of the religious worship itself, of any denomination. All schools, more or less, are religious charities; for courts of equity, in this country, will not sanction any system of education in which religion is not included: and where education is to be provided for Christians of different denominations, there, by reason of the necessity of teaching religion according to different tenets, instruction according to the doctrine of the Church of England must prevail; but provision will be made as far as possible for the exercise of conscientious scruples on the part of Dissenters. (*The Attorney-General v. Cullum*, 1 Y. and Coll. Ch. C. 411.) And, as regards trustees, further provision is made by Lord Chelmsford's Act.

1. Of course in these as in all other cases of charitable, or indeed of any, trusts, the Court will exercise its jurisdiction so far as it may be necessary to assist in enforcing a trust on the holder of property claiming to hold it for his own use and benefit, but bound to hold it as trustee, whether or not he himself is entitled to part of it as being also one of the objects of the trust. To recover trust property from a person not a trustee requires rarely the aid of a court of equity, and rather pertains to the jurisdiction of a court of law; and where the intervention of a court of equity is required against a holder of trust property being himself entitled to part of the benefit of it as a schoolmaster, clergyman, priest, or preacher, the question will usually be as to the proportion he has a right to retain for his own personal use—as where a schoolmaster retains all the income of a charity, whereas he is bound to

apply a portion of it for the improvement of the school, as in the case of the *Attorney-General v. Tuffnell*, 12 Beav. 35. Questions of this kind usually arise in cases where the incomes of charities have increased, and they are settled by a new "scheme," where the holder is not entitled to retain the whole of the surplus—the principle as lately laid down in the House of Lords being, that where the intention indicated is that the general object of the charity shall have a certain sum only, then the whole surplus goes to the personal use of the holder; otherwise, he only shares the surplus with the general object.

2. It is a general principle of the Court not to interfere in the internal management of a religious charity, so far as regards detail; and thus, for instance, where the master of a school for the members of a particular Church must be in holy orders, no regulations will be imposed by the Court as to religious instruction, that being left to him, subject to due spiritual control. (*In re the King's Grammar School, Warwick*, 14 L. J. Chanc. 338.) There is this distinction between charities educational and eleemosynary, that the exclusive privilege or preference given to the Church of England in regard to endowments, not for the benefit of a particular denomination, is confined to the former class alone.

3. As regards religious charities, the Court of Chancery confines itself to seeing that the administration is in the right hands, *i. e.*, that the trustees and officers—as ministers, masters, and the like—are of the religious denomination entitled to the control of the charity. For this purpose, however, the Court has to decide incidentally whether a person is a member of a religious Church or body, or holds its doctrines; and thus, indirectly, the Court has to decide, not indeed questions of doctrine or discipline as such, but as questions of fact. As regards questions of discipline, indeed, the Court simply adopts the decision of the proper spiritual authority of the particular religious body. Thus, for instance, where the minister was to be "in full communion with the Scotch Church," and he had been expelled, it was held that he was no longer qualified to fill the



office, and his removal was decreed. (*Attorney-General v. Munroe*, 2 De Gex & S. 12.)] And as regards questions of doctrine, the Court simply decides as a matter of fact whether such or such doctrines are or are not the tenets of the religious body : as in a late case, where the Court had to decide whether a Baptist preacher who did not hold to "strict communion" was entitled to retain an endowment for the support of the religious denomination termed "Particular Baptists." (*Attorney-General v. Gould*, 30. L. J. Chanc. 77.)

4. Again, where disputes arise between the trustees or managers of a religious charity and its officers—as the minister of a chapel or the master of a school—the Court has to settle the dispute upon the bases of the doctrine and discipline of the Church or religious body to which the charity pertains, as in a recent case, where the trustees of a French Protestant chapel had taken upon themselves to remove the minister, on grounds not coming within the regulations of their Church. (*Daugars v. Rivaz*, 29 L. J. Chanc.) The Court, in such cases, decides on questions of doctrine or discipline simply as matters of construction on the formularies of the particular Church or religious body, just as the Privy Council decide on cases arising in the Church of England; and on questions of discipline the decision of a lawful spiritual superior would no doubt be received and acted upon, as in the case of the Church of Scotland already alluded to; and on questions of moral misconduct the Court would not decide questions of bare fact, as to whether the imputed misconduct had in fact been committed, leaving that to the managers, trustees, or ecclesiastical superiors, and merely seeing that the charge made, or offence imputed, was one on which they had, by the constitution of their religious body, a right to dismiss the officer.

5. This incidental and indirect power of deciding questions of doctrine or discipline judicially, as matters of fact or of construction, and according to the rules of each religious body, has never been objected to by the religious bodies most sensitive of State control; for the authority of every religious body

to govern itself is not only recognised, but aided and enforced, all that the Court does being to ascertain what are its rules, and then to follow them out. It is impossible to suggest that this is any violation of religious liberty, or spiritual independence, and consequently the Dissenters have never so deemed it; and even the See of Rome has sanctioned an appeal by a Roman Catholic bishop to the Privy Council on a question relating primarily to the rights of control over the funds of a Church, but involving indirectly religious questions. (*Hughes v. Pownal*, 4 Moore's Privy Council Cases, 47.)

6. Similar principles are applied in the settlement of new schemes for religious charities; as to which, if the fund is for a body or institution already existing, as a college or the like, it will be handed over to the heads, without a scheme, and left to their administration; in the absence of any dispute as to their personal participation in it, as already alluded to, (*Walsh v. Gladstone*, 1 Ph. 29.) But where the object is quite general, as for the support of Baptist or Romanist preachers, or the like, and is not by the donor confided to the discretion of any designated person, a scheme must be settled; and is always done with due regard to the wishes of the heads of the religious body concerned, who are invited to offer any suggestions with that view. If, however, the charity is in the general discretion of a trustee, as where the fund is to be applied to religious purposes at the discretion of a bishop or clergyman, all that the Court does is to see that he has applied it to some such purposes, not at all interfering with his discretion, nor proposing any scheme.

7. The Court interposes to prevent any diversion of the funds from one purpose or place to another, as where they are applied to purposes or persons out of the place, entitled to the benefit of the charity, which can never be done without the sanction of the Court, under a new scheme, as in the case of the Manchester College, 22 L. J. Chanc. 57, where the object was the training up of ministers for the Protestant Dissenters, and with that view a college was to be founded at Manchester;

but the Court held that the place was not one of the main objects of the charity, and only accessory, and therefore sanctioned the removal of the charity to another place. In like manner, it would require the sanction of the Court (or, now, of the Commissioners) to apply the income of a school to a chapel, or of a chapel to a college, and the like: and even the Court cannot go beyond the limits of what is called the *cy-près* principle, adhering to the donor's intent as far as possible; and any further extension of the charity involving an alteration of its scope or design, other than what is necessary, must be sought from Parliament.

Such are the principal heads of the jurisdiction of Chancery in regard to religious charities; and it is manifest that they all, especially the last, involve points of great difficulty and delicacy, very unfitted for the adverse litigation which more or less must take place in proceedings in Court, and far more suited for the domestic jurisdiction of the Commissioners of Charity.

At the present moment, it is in the power of any person who conceives himself interested in a religious charity to file a petition or commence a suit in Chancery, which then, in a hostile suit, must proceed according to its strict rules; and the publication of accounts,\* and the enrolment of trust deeds, afford anybody the means and materials of inquiry and litigation.

One object of the jurisdiction of the Commissioners is to mitigate the strictness of the rules of equity as regards trustees, and to afford them easy means of obtaining direction, indemnity, and security. And with reference to religious trusts, which obviously involve a great degree of delicacy, in which often much injury may arise from publicity, it is a great advantage that the powers of the Commissioners may be exercised privately and only to the knowledge of the parties interested, especially as all the powers are rather in the nature of powers of counsel, arbitration, or conciliation, than of adverse adjudication.

\* By the Charitable Trusts Act, 1853—1855, every trustee or holder of trust property is bound to send his *accounts* to the Commissioners on the 25th of March in every year.

Take, for instance, their power of "opinion, direction, or advice," (Act of 1853, s. 16,) for acting on which a trustee or holder of charity property is indemnified. How invaluable is this power, in the many cases which must occur, where the holder or trustee is in doubt how to act; more especially in cases where he is himself entitled to some share in the trust, and is not quite certain how much; or, again, in cases where he has, acting for the best, applied the funds to religious purposes, quite in accordance with the general intentions of the donor, but hardly within the strict and narrow limits of the *cy-près* principle, as laid down by the Court. It is in religious charities that this difficulty arises more than in any other. And not only have the Commissioners power to give advice which the holder or trustee is indemnified for acting on, but they have a liberal and beneficial power of sanctioning compromises of claims on behalf of any charity, aided by an absolute power of restraining any suits in Court. Thus their powers are healing and saving, solely for the benefit of the charity and the assistance of the trustee. Even in Court a mistaken deviation from the letter of a trust, an application of the fund according to a general rather than the particular intention, is never visited severely, and this power of the Commissioners is only to give directions as to the future, and compromise as to the past. As to any doubtful questions that may arise, it will be the general object of the trust which will be looked to—the spirit rather than the letter; and in the solution of any doubtful question, the counsel and opinion of parties interested in the charity, or having authority in the religious body concerned, will be respectfully received and attended to.

Again: take another head of the jurisdiction of Chancery over religious charities, that of disputes between the trustees of the charity and its officers—as the master, minister, or the like. These are, above all, the most painful class of cases; and in the case of the French Protestant Church above alluded to, the Master of the Rolls did his utmost to avoid deciding it,

and to induce the parties to yield to an amicable adjustment.

In such cases, the power of giving advice and direction is likely to be very beneficial. Nor is this all. The Board have no power to remove a trustee on the ground only of his religious belief, (Act of 1860, s. 4,) but on any other ground they may; and on that or any other may sanction an application to the Court, which may be at Chambers, but of course with power of appeal. Then the Board, upon proof to their satisfaction that any master or mistress, or other officer of any charity, has been negligent, or is incompetent or unfit for the discharge of the duties of the office, from immoral conduct, age, or any other cause, may empower the trustees to remove the person. (Act of 1853, s. 22.) This would apply to the master of a hospital, or head of a college, but query as to the preacher or minister of a chapel? The Act exempts buildings registered for religious worship; but it is not clear that this exemption embraces endowments for the support of ministers, preachers, or the like. But beyond all doubt, the Board, in such cases, would not go farther than to advise, or, by consent, to arbitrate. Where, indeed, a master or mistress, or any other officer, or any recipient of the benefit of a charity, shall have been removed from, or cease to hold, his office or place—*i. e.*, by the proper authority of the religious body concerned—but shall refuse to relinquish any house of which the right of possession is attached to such office, the Board have power to give a certificate on which any magistrate will summarily act, by ordering his expulsion. This is a highly useful provision, likely to be beneficial to all religious denominations, for it is not at all uncommon for a preacher, minister, school-master, or the like, having been validly dismissed by the religious body to which he belongs, to retain possession of the house or building, entailing the necessity of a long and expensive suit, with painful exposure and perhaps scandal; whereas, under this useful provision, the Board being only satisfied that the party has been removed by the proper authorities of

the charity, or by his religious superiors, without re-entering into the merits or demerits of the question, will issue their certificate, on which a magistrate will act. This provision, it will be seen, plainly applies to ministers, preachers, or the like, for it extends to any "recipient" of a charity; and the house or endowment attached to the person of the minister for the time being, is quite distinct from the place of worship, which is exempted from the Act.

Again, in all questions relating either to the investment or recovery of charity property, the power of obtaining advice from the Board must be very valuable. Trustees desirous of vesting property are often very much perplexed with respect to investment and security, and may hesitate, on their own responsibility, to allow property to remain in the hands of its holders; or, of their own motion, to indicate suspicion or distrust. We refer to cases in which the property is in hands different from those of the persons interested in, or intrusted with, the management of the property. This may be either where the property is directed to go in one line, and the trusteeship in another, or where property has been left to a charity, and has been allowed to remain in the hands of executors, heirs, or other representatives of donors; or where the trustees have themselves died, and left no proper or efficient successors. In these, or similar cases, in which property is often lost to charities, it is obvious that the powers of the Commissioners in giving advice, and in taking steps to secure the property for the charity, must be invaluable. In the exercise of their salutary jurisdiction the first step is, to get the accounts and inspect the deeds; next, they may make inquiries, where there appears any necessity on the face of the accounts; then they may offer suggestions, or give opinion and advice. They may interfere to prevent litigation; they may take measures to secure or recover charity property; they may, in short, do a great deal for the benefit of the charity, and for the assistance of the trustees or recipients; but nothing else, save in cases not likely often to occur, of obstinacy, or dishonesty; and

then they can do no more than leave the matter in the hands of the Court of Chancery. The Court now has jurisdiction over all such cases, and exercises that jurisdiction in the manner already described. It is in the power of any person to invoke its authority, with the sanction either of the Board or of the Attorney-General. The Legislature, however, has itself deemed it for the interest of charities to avoid, as far as possible, litigation, and hence has established the domestic forum of the Commissioners, who exercise their power solely for the benefit of the charities, and with that view peacefully and in private, full provision being made for amicable communication, through the medium of inspectors, with the parties interested. These may find it inconvenient to attend the Commissioners themselves, and the object is to exercise the jurisdiction as amicably, carefully, and inexpensively as possible. Beyond the distance of ten miles, therefore, parties are not obliged to attend the Commissioners, and inspectors may visit them, review their suggestions, make personal inquiries on the spot, and obtain a great deal of practical information, which could only be imparted by oral communications. The working of the jurisdiction as to religious trusts depends in a great degree, it is obvious, on the inspectors, who should be members of every religious denomination, and thus be able to understand and convey to the Commissioners the opinions, feelings, usages, and requirements of the religious bodies to which they respectively belong. And thus every possible care has been taken to provide an amicable arbitrament of the delicate questions which arise in religious trusts, without hostile litigation.

Of course the chief charge of the Commissioners is the property of charities; and the functions they have with the aid of the inspectors to perform, may be looked at as they regard either the acquisition or the administration of charity property, each of these heads again sub-dividing itself into two—the first, into the getting in of the property and the securing of it; and the other, into the management of the property, (if realty), and the application of the funds.

Take the first head—the acquisition of charity property. The powers of the Commissioners, and the functions of the inspectors, will be a great advantage, both as to getting at or finding out the gifts or bequests, and properly securing them for the charities. It is within our knowledge, that a vast deal of property is lost to charities for want of being known, or got at. Legacies or bequests are often not heard of, or are allowed to be in the hands of heirs or executors until forgotten. A Roman Catholic gentleman lately died, leaving very large sums for charity. The executors not only did not state the fact, but concealed it, and omitted the usual course of reading the will, saying that it “did not concern any but the family!” Registries may be searched and wills may be read; but, for the most part, what is everybody’s business is nobody’s, and hence it is that the Commissioners are empowered to inspect and require copies of wills.

Inspectors, too, may be sent round to make inquiries, to see why legacies are not realized and received, or property not conveyed to a charity; and the mere fact that inquiries are made by persons having authority will compel parties to do what they ought to do in such matters. The persons interested may themselves feel a delicacy in interfering in cases where the charity assumes a personal form, as in gifts for the support of ministers or the like. We know of some cases in which, through this delicacy, inquiries have been delayed until insolvency has intervened, and the property has been lost. In cases where, again, the parties holding the property die, it often gets into the hands of persons unfit to be trustees, and disappears. Then, again, as to securing the property, there is often a necessity for personal inquiries on the spot, such as inspectors can prosecute.

Then, again, as to the management of charity property. There is more need of such inquiries in the case of religious charities than any other, for the persons interested are rarely acquainted with legal rights or the value of property, or well able to understand its management. Now, practically, the manage-



ment falls into the hands of some attorney, or steward, or person in a similar position, without any real control, and with every opportunity of collusion. Apart from fraud, there is certain to be mismanagement, and a great loss of income to the charities. It was on this ground the Ecclesiastical Commission was instituted, to take the management of Church lands. And the heads of any religious body—the ministers of a chapel or the fellows of a college—are not likely to exercise a very active or astute control over the letting or managing of property. The mere fact of inquiries being made by persons in authority, or charity inspectors, will serve to awaken parties to a sense of responsibility, and tend to prevent fraud, while the advice and assistance of the Commissioners will promote good management, and increase the income of charities.

There is one class of Roman Catholic endowments some of which certainly will come under the definition of charities, and to which these remarks will especially apply; we allude to convents of women, which are allowed by the Emancipation Act, and are increasing. The property of these institutions must of course be in trust; and as the inmates are always a numerous, uncertain, and fluctuating body, and as part of the funds are always, by the rule of the order, to be spent in charity—and in some cases, probably, charity forms an essential part of the rule—no doubt they will fall under the definition of charitable or religious trusts, especially as a chapel always forms part of the institution, and, generally, a school. It can hardly be expected that these religious ladies are themselves competent to manage property, nor can anyone with any knowledge of human nature suppose that they always escape imposition or avoid mistakes. To prevent mismanagement, and consequent loss of income, the inquiries of inspectors of charities will surely, to say the least, do no harm; and it is only by these means that any precautions at all can in such cases be taken against mismanagement. It cannot be expected either that the ladies shall leave their convents and come up to see the Commissioners, or that the Commissioners

shall go to see them. The first course would be often contrary to their rule, and always very inconvenient; and the other course would be manifestly impracticable, as the Commissioners or central authority cannot be constantly running about the country. Somewhat similar observations apply in the case of religious seminaries, colleges, and the like. The tutors or superiors cannot conveniently leave them; and, indeed, the Act provides that no person need go more than ten miles away from home. The inspectors are provided for the very purpose of going from place to place, and seeing those who are interested in charities, when occasion arises for conferring with them, giving or receiving information, or making such inquiries as may be necessary.

As regards the application of the funds of a charity, it should be borne in mind that as the Court of Chancery never interferes with the details of the internal management of a religious charity, so neither will the Commissioners. All that either the Court or the Commissioners look to is the application of all the funds of the charity to the purposes of the charity; except in the case of the settlement of a scheme, which never takes place where the donor himself has settled it, or left it to the discretion of any person or class of persons in whom he has chosen to confide. In this last case, all that the Court or Commissioners require is, that the funds shall be all applied to charitable or religious purposes by the person or persons so intrusted, at his or their discretion, in no way interfering with the exercise of that discretion. Where the object of a religious charity is defined in general, or where it is the support of a specific existing institution, as a college, the application is left to the authorities; and the Court or Commissioners in no way interfere with the course of instruction, the system of tuition, the institution of chairs of professorship, or the like. All that they see to is the faithful employment of the funds for the benefit of the institution. So in a school, a chapel, or the like, the control of the minister or master, and the course of instruction, or the system of religious worship, are left to the proper authorities.

What the Court and Commissioners see to is that the funds are fairly and faithfully employed ; for instance, that the minister or master does not engross all when part should go to repairs or the like.

It might fairly be supposed that to such a jurisdiction no religious body could possibly object, nor has any objected to it ; though the "law of superstitious uses" raised an obstacle in the way of its application to the Roman Catholic body. Yet for its application to that body there was, perhaps, greater reason than in the case of any other, on account of the secrecy which had been caused by the penal laws, and the abuses certain to result from secrecy. Of this the Roman Catholic body itself was fully sensible ; and after O'Connell's Act, passed in 1830, to legalize gifts or bequests for the purposes of Roman Catholic religion or education, the feeling in favour of a Charitable Trusts Act, to include Roman Catholic charities, strongly pervaded that body. That Act was, it will be remembered, retrospective, and made perfectly legal past as well as future endowments for Catholic religious worship. There was, then, no reason why—with some provision for the uses called "superstitious"—those trusts should not be brought under the protection and supervision of the law ; and there were the strongest possible reasons why they should be, which were thus summed up, in 1847, by the *Tablet*, then the only organ of the Roman Catholics :—

"There is a belief that under the extraordinary concealment which the old penal laws rendered necessary, Catholic trust property has been irregularly administered, that funds left for one purpose have been devoted to another, that infinite mistakes have arisen from these confusions, and that it is necessary once for all to put order into this chaos, and to throw light on what has been, up to this moment, shrouded in darkness. The only prudent course is not to shrink from the application to our charities of laws based on a general and comprehensive equity." (*Tablet*, May 22, 1847.)

There has never been any reason to doubt that this was and

is the feeling of the great body of the Roman Catholic community. Before the Mortmain Committee, in 1851, Cardinal Wiseman himself declared that he had no reason for feeling any distrust of our courts of equity, (Q. 3391;) that if measures were taken to secure ecclesiastical property, he would rather have trusts declared and the deeds registered, (3592;) and that the only reason why they should not be so, and subject to the jurisdiction of the courts, "was, that if property was left for the endowment of a church or for schools, by the mere condition of masses being required, the whole gift would be void," (3389;) and all that he required was "that the law should be such, as that if the proposed object of the legacy was not masses, but something of undisputed charity, the legacy should not be invalidated and made void by the condition of masses being annexed." (3399.)

There were, indeed, a particular class of cases in which that eminent prelate avowed that he objected to the application of the law—viz., cases in which property was given to prelates or priests in their ecclesiastical character, but without any express trusts; and he contended that where money or property was given to them, even though entirely in their ecclesiastical character, without express declaration of trusts, they would not be bound to apply it to religious or charitable purposes, but might apply the whole, or any part, to purposes purely personal. (3540—3594.) And this, no doubt, has been at the bottom of the subsequent opposition to the application of the law on the part of that eminent prelate, and those who represent his views.

Now, if they had confined themselves to arguing that, no trusts having been declared, it must have been intended by the donors that they should apply the fund to religious or charitable purposes at their discretion, and that therefore the Court or the Commissioners would have no right to interfere with the exercise of that discretion, they would probably have been right; and perhaps they would have been justified in contending that, to the extent to which the fund might be necessary for their

decent and becoming support, a personal application of it would be in accordance with the spirit of the trust, and the intention of the donors. But surely they went too far in disclaiming any trust at all, bearing in mind the fact which no one can forget, that, but for the penal laws, trusts would have been declared, if only for the purpose of securing the fund to the successors of the first donees, it being admitted that the endowment was destined for them in their ecclesiastical character.

However, the ecclesiastics who had these funds, and avowed that they dealt with them as their own, of course opposed the application of a law which they probably supposed would deprive them of all control over the funds they had thus so long enjoyed; and, therefore, when the Government carried the Trusts Act of 1853, they first obtained an exemption of Roman Catholic charities on the ground that there must be some provision for the law of superstitious uses; and next, contrived, year after year, until 1860, to evade the removal of that exemption.

When the Government proposed at last a measure for the application of the law to Roman Catholic charities, the Home Secretary (Sir G. Lewis) stated, in his place in Parliament, that "it was framed upon a principle which, he understood, received the approbation of a large portion of the Roman Catholic body—viz., to prevent any Roman Catholic endowment being tainted or rendered invalid by the doctrine of superstitious uses, and to give the Court of Chancery or Charity Commissioners power to convert such a trust, not recognised by law, into a legal trust:"—*i.e.*, some trust under O'Connell's Act for Roman Catholic religious worship or education.

This, it will be observed, was, in substance, what Cardinal Wiseman himself had suggested in 1851—viz., that the whole endowment should not be vitiated or rendered invalid. And it was the principle adopted by the Act of 1860, with the approval of Mr. Monsell, the Roman Catholic member of highest

authority in the House, but with the opposition of those who represented Cardinal Wiseman's views. The reason of that opposition is obvious. In the case of an endowment, of whatever amount, enjoyed by an ecclesiastic, with the condition of celebrating mass for the soul of the donor for ever, the effect of the Act is to enable the Court or Commissioners to affirm a trust; whereas the object of these ecclesiastics, as avowed in 1851, was to keep the fund under their absolute control, and with the right, as they asserted, of applying it in whole, or part, at their discretion, to uses purely personal. They did not, perhaps, understand that although the Court or Commissioners should declare a trust for religious purposes, it would probably in such cases, be a discretionary trust, and, to some extent, be secured for the personal use and benefit of the holders. They conceived that, by the assertion of a trust, they should lose certainly all control, and possibly all benefit. And as the *Rambler* (the most able Roman Catholic organ) truly observed, it was natural that men who had so long dealt with these funds as their own, should dislike the idea of control, still less of deprivation.

To a certain extent, then, opposition was—under a mistaken notion of the law—natural and intelligible. It would have been better had it taken its real ground boldly, and not have been put forward under the disguise of an indignant anxiety for the souls of the donors. We enter into no theological question in these pages, we only touch on theology as it bears upon law; and in dealing with the law of Roman Catholic religious trusts, we must, of course, as Parliament and the Courts do, take Roman Catholic theology as our guide. But even upon the principles of Roman Catholic theology, it can be shown easily that the souls of the donors would vastly gain by the operation of the law. The Court or Commissioners, on the *cy-près* principle, would, in declaring a trust, (if they defined it at all and did not leave it discretionary,) no doubt declare it to be for Roman Catholic religious worship. Now, every one knows that is the mass, and every one also knows that every

mass is *pro vivis et defunctis*, for living and dead ; and every Roman Catholic knows, or ought to know, that, without express trust, every priest receiving the benefit of a bequest for his support as such, is bound *in foro conscientie* to celebrate for the donor's soul. Now then, taking these premises and putting the case of an endowment of £1000 a year now enjoyed by a Roman Catholic priest or prelate, and without express trust, and, as he asserts, for his own personal benefit,—suppose the Court or Commissioners should define a trust, and not merely declare it, and leave it in his discretion to what religious purposes he should apply the money, but define its objects to be, say the support of ten poor Roman Catholic priests, the effect would be, that they would all be bound to remember him at the altar, and thus the spiritual benefit, on Roman Catholic principles, would be multiplied tenfold.

These views were enforced by Mr. Finlason, in his work on charitable trusts, published last year ; and it was assailed for that reason with the greatest acrimony by the *Tablet*, which for some years had abandoned its former views, and violently opposed the application of the law. The work was, however, favourably reviewed in the *Weekly Register*, the organ of the more moderate of the English Catholics, and by the *Rambler*, the paper of the most independent and highly educated among them. The *Register* stated what we know to be the fact, that the English Catholic lawyers (except Sir George Bowyer, the organ of Cardinal Wiseman's opposition) were of opinion that the law would work no injury to Roman Catholic charities ; and the *Rambler* stated, "There is no reasonable ground to anticipate that the working of the Act will inflict practical injury or innovate upon the recognised customs of pious Catholics." In fact, as Mr. Finlason states, even if such bequests (for masses for the souls of the dead) were charities, the Court would not recognise them as such, because it could not enforce them. It is said, indeed, that a bequest to a priest for masses for the souls of the dead is made void. That is an entire error. It is only endowments expressed to

be for the souls of particular persons, or for ever, which are deemed superstitious. As the late Lord Chancellor pointed out, not only is there no law against prayers for the dead, but it was decided in *Breeks v. Woofrey*, (1 Curtis's Ecclesiastical Reports,) that they were legal. O'Connell's Act legalized the mass, which by its very terms is always for the souls of the dead; and, in the Fishmongers' Company's case, the Court of Chancery declined to say that endowments for prayers for the dead were superstitious, but declared that endowments in perpetuity for the application of such prayers to particular persons were so. It is the perpetuity, and the declaration of an intention for an exclusive personal application, which is deemed superstitious. There is reason to believe that this was always so deemed, even in Roman Catholic times; and the Council of Trent makes provision for the commutation of such endowments after a lapse of time. But there is, under O'Connell's Act, no difficulty in leaving any amount of money for the celebration of the Roman Catholic worship—that is, the mass; and according to the Roman Catholic religion, the donor must have the benefit of it, although it is not made a matter of express request or condition. Now anyone who looks at the Roman Catholic Clergy List, or the Poor-school Committee Reports, will see that the Roman Catholic prelates actually recommend that bequests shall be made, without any express condition or request. In the face of that, and of well-known Roman Catholic doctrine, it was simply dishonest for the *Tablet* to represent that, by the law, “a bequest to a priest for the souls of the dead is made void.” All that is made void is an expressed condition for a perpetual or exclusive personal application, which condition the Roman Catholic prelates themselves publicly profess to be perfectly immaterial.

In plain English, all this is mere disguise of the real reason for the opposition to the law, which is that already explained—the dislike to control, and the dread of deprivation. The dislike, as the *Rambler* says, is natural, the apprehension is



erroneous. There is no reason to suppose that even the possession of the fund will in any case necessarily be changed; certainly not the substantial destination. And if there be any change, it will be in favour of, and in furtherance of, the religious objects of the donors, and for the increased support of Roman Catholic worship and the Roman Catholic working clergy. On the whole, then, we think the *Rambler*—as the organ of the more enlightened among the English Catholics—is right in saying that the law will be beneficial to their religious trusts as to all others. Indeed, the bishops themselves seem to have come to the same conclusion, or, at all events, to have become convinced that there are no evils to be apprehended to countervail the obvious advantages of the jurisdiction. They have taken wise counsel, and resolved that there are no reasons why the law should not be applied to the religious trusts of their body. They have therefore directed their trust deeds to be enrolled, as the first step towards bringing them under the jurisdiction of the Commissioners, and avoiding that secresy in which abuses of all kinds are certain to exist.

These trust deeds, however, thus enrolled, relate only to real property; and probably there is a far greater amount of personal property left for charity, the possession and application of which are equally shrouded in secresy. That this should be, is clearly contrary to public policy; and nothing can be more injurious to the interests of religion than that the ministers of religion should be allowed to lay hold, in secret, of any amount of property which their spiritual influence may enable them to grasp—getting it under the notion that they will apply it to purposes of religion or charity, but keeping it for their own personal use—and to that end, as far as possible, concealing their possession of it. Such a system is a stimulus to every species of undue influence and the worst forms of vice, hypocrisy, and avarice. These remarks apply to every religious body; but most of all to the Roman Catholic, for very obvious reasons. The Roman Catholic system affords

means for the exercise of undue influence and the extracting of money by such means, possessed by no other. There is, on the one hand, the system of what is called "spiritual direction," which, in defiance of its own rules of discipline, is habitually exercised by those who direct the pocket as well as the conscience of the penitent—as was shown in the case of *Middleton v. Sherburn* (4 Y. and G.)—and then there is, on the other hand, the doctrine of the application of the spiritual benefit of the mass to the souls of particular persons, and the lawfulness of this application being secured by means of money. It is true that, to avoid the obvious dangers of simony or avarice which the Council of Trent points out, the canon law fixes the sum to be received, in respect of each mass, at a very low rate, which in this country is five shillings, and also forbids the priest from satisfying more than one obligation by the same mass; but who believes that this is adhered to? And, indeed, it is openly avowed that it is not; and the *Tablet* publicly declared that it was not only lawful, but laudable, to give a priest any sum—from £5 to £500—for a mass or masses. Can a system be devised more fraught with danger of every possible abuse? Especially when along with it we have another system of gifts or bequests to ecclesiastics as such, without any declared trusts or objects, but evidently meant for purposes of charity; and yet as to which the head of the Roman Catholic Church in this country has declared that they are at liberty to apply the whole to their private personal use! Taking these two systems together, we can safely say that nothing more injurious to the moral character of a clergy could be conceived. And we know of no remedy save publicity, which to some extent may be secured by the action of the law under the auspices of the Commissioners of Charity.

## ART. III.—THE RULES OF EVIDENCE.

*The Rules of Evidence Stated and Discussed.* By John Appleton, Justice of the Supreme Court of Maine. Philadelphia, 1860. 8vo. Pp. 284.

INTERNATIONAL communication between the United States of America and this country is comparatively almost suspended. Trade and commerce are temporarily closed; and we are informed that even the heretofore increasing export of second-hand books and new London publications is almost entirely at an end. A mournful and terrible civil war is extending throughout the great Transatlantic Union. The Federal Constitution is undergoing its first trial. But whatever the final results of this sudden and unexampled social convulsion—whether the Northern and Southern States ultimately separate or *re-unite*—whether two or even more of the thirty-four States and several non-admitted “territories” split into divers distinct and independent political communities—whether consequentially, from the present “break up,” slave labour be or be not perpetuated, the judiciary system and laws of the United or Dis-united States will survive the altered forms and boundaries of their common government. Our law journal is, however, not the medium for the political controversial discussions now occupying the public press of England. There is, however, no reason why we should suspend our occasional reviews of New American law books. It is, indeed, with peculiar satisfaction that we now notice the excellent work, the text of this article. Mr. Appleton was formerly an eminent member of the United States Bar, and he is known to us as a highly-educated and accomplished jurist. He is now the fourth of five judges constituting the Supreme Judicial Court of the free State of Maine. An early and practical law reformer, he

had for several years contributed many valuable articles on legal subjects to the law journals and literary reviews of the Union. The subject of *Evidence* specially engaged his attention, having, as he says, early "read, with great instruction and interest, the masterly work of Bentham." His volume on the "Rules of Evidence" is the well-considered result, therefore, of study, of mature reflections, and a professional practice of years. Mr. Appleton is the first writer who has applied the reasoning and principles of Bentham to the law as found in the treatises of juriconsults and the decisions of Courts. It reflects no credit on the British Bar that none of our writers on Evidence have made a similar use of Bentham's most valuable and exhaustive treatise. Future editors of Starkie and Roscoe, or new compilers, may remove this discredit.

Mr. Appleton's volume consists of sixteen chapters. They severally distinctly consider the arguments in favour of excluding witnesses—incompetency from defects of religious principle, from infamy of character, and from interest. These questions are considered in reference to witnesses at common law, in equity, and in criminal procedure. The eighth chapter discusses the admissibility of accomplices and parties to the record in criminal procedure. The incompetency of the husband and wife as witnesses is separately considered. The subjects of privileged communications, [confessions, and hearsay evidence, occupy three other chapters. The modes of examination and cross-examination are] also fully investigated and considered. Mr. Appleton's last chapter exhausts the question of judicial oaths. An appendix of twelve pages closes the volume, containing a brief but valuable abstract of the legislation of the different States in relation to the laws of evidence. Such are the general and important contents of the author's 284 pages; and his distinctness of style and closeness of reasoning are not the least merit of the work.

The preface states the conclusions to which he has arrived: they may be shortly given, nearly in his own words, viz.—1. That all persons, without exception, who, having any of the

organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses. 2. That objections may be made to the credit, but never to the competency, of witnesses. 3. That while the best evidence should always be required, the best existing and attainable evidence should not be excluded, because it is not "the best evidence of which the case in its nature is susceptible." 3. That the best mode of extracting testimony, orally, in public, and before the tribunal which is to decide upon the facts in dispute, should be adopted on all occasions, and before all Courts, when practicable. The only exception to the universality of this rule is one arising from special delay, vexation, and expense in its observance, as in case of sickness, or the absence of witnesses.

Mr. Appleton, in his various chapters, details the remedial legislation accomplished in different States of the Union since the original ends of the Transatlantic system of evidence were first denounced by the law reformers of his country. Many of the reforms he and other commentators advocated have been partially adopted. Interest and infamy in many of the States have ceased to be grounds for the exclusion of testimony. A limited admission of the testimony of the husband and wife has been allowed in cases in which one or the other is a party. The Statute Laws of Maine enact, (1859, c. 102, s. 1,) that "in the trial of all civil suits, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife." The parties in civil cases, with greater or lesser restrictions upon their testimony, have been received or compelled to testify in their own cases. In offences of the lowest grade of criminality the accused, by the law of the same State, (Maine Stat., 1859, c. 104,) is admitted as a witness in his own behalf. The enactment is as follows:—"No respondent in a criminal prosecution or proceeding at law, for libel, nuisance, simple assault and battery, or for the violation of any municipal or police ordi-

nance, *offering himself as a witness*, shall be excluded from testifying; and all laws inconsistent herewith are hereby repealed." The simplicity and effect of this enactment resemble the pithiness of *Scobel's Acts and Ordinances* of our own Commonwealth.

We continue Mr. Appleton's record of reforms. Incompetency from defect, or a want of religious belief, is still the law in most of the States. The communications between client and attorney remain privileged. The law as to confessions and hearsay continues in a condition pre-eminently chaotic. Different Courts, and the same Court on different occasions, employ different modes of extracting proof. Still, much remains to be done. But, so far as changes have been made, Mr. Appleton states that their practical working in the administration of the law has been such as to make it a matter of astonishment, how Courts could have ever hoped to administer justice when the evidence now received was excluded.

It is impossible, within the limits of a single article, to review the several important questions raised in this valuable collection of legal dissertations. We can only, in the present review, thus notice the contents of Mr. Appleton's original disquisitions. They, of course, relate chiefly to the laws of evidence governing the white citizens of the free States. Maine, Mr. Appleton's own State, is a free State. We believe that, in a gross population by the last Census, it contains a population of 620,000 inhabitants, the free coloured persons being under 1,500. Nevertheless, Mr. Appleton advocates the admission of the evidence of slaves in the Courts of the Union; and he thus remarks on the injurious exclusion of their testimony:—

"The common law may be taken as the existent law of evidence, except so far as the same may be modified by the statutory provisions of the several States. Those modifications it was no part of the object of this treatise to discuss. But there will be found one class of exclusions, so enormous in its extent and so disastrous in its results, that it absolutely requires notice and consideration. I refer to the exclusions of the blacks and those of mixed descent, whether

bond or free, and of Indians ; by the former of which, in some of the States, the majority of the population are deprived of all right to testify as against the dominant race ; by the latter of which, the original occupants of the soil are denied by the higher civilization, which has wrested from them their lands, even the right to bear witness in the Courts of, and against those who now possess them.

"The rightfulness of slavery—its patriarchal antiquity—its constitutionality—its Christian graces, and its moral beauties may, by way of argument, be fully admitted ; it may be conceded to be an institution alike beneficial to master and slave—sanctioned and approved by the laws of God and man—the first realization in practice of the golden rule—'that all things whatsoever ye would that men should do to you, do ye even so to them,'—still, the enormity of the exclusion only thereby becomes more strikingly apparent.

"In some of the States, according to the existing statutory law, in all cases between those of the dominant race,—whether civil or criminal—between them and one of the degraded race—whether relating to person or property,—where the now excluded testimony exists, and is the only attainable proof of the truth, the failure of justice is sure and unavoidable. By its admission, a chance for justice, greater or smaller, according to the reliability of the evidence, is obtained. Without it—it being the only evidence—the means of correct decision are unattainable.

"While this remains the law, any and all conceivable wrongs and injuries may be inflicted by any one of the dominant upon any one of the servient blood—by the minority, it may be, upon the majority—and this without fear of punishment, if those of the proscribed race only are present. Those of African or Indian descent are thus without the protection of the law, as against the whites.

"The exclusion of witnesses, or absurd and illogical rules for the ascertainment of facts, are unmistakable proofs of deficient civilization. Barbarous nations resort to the ordeal or to lot. They shut out witnesses from some prejudice—because they are of a different religion or of different complexion. The principle is the same in each case. They judge of testimony by count, not by weight. As civilization advances, these rude methods of investigation, one by one, pass away. The ordeals, whether by fire or by water, like the oracles of the Pagan priesthood, vanish into thin air. The sacred lot loses its significance. Witnesses cease to be excluded. It is seen that the credit of witnesses can be more satisfactorily determined after than before a hearing. All are received as witnesses, and the various corroborating and discrediting circumstances are weighed and considered.

“Why then exclude the black man—whether free or slave? Why exclude the Indian? Because of colour? Certainly not. Because of deficient moral sense and probable falsehood? Is he generally false and mendacious? Granted; men do not lie without motive. It is a reason, in each instance, for more carefully scrutinizing his statements—for guarding against too implicit credence. The common law receives the liar, however notorious he may be, and permits the credit of his statements to be impeached by the worthlessness of his character. The convicted perjurer is received in some of the States, and should be in all, subject to the deductions necessarily incident to his conviction.

“Will it be false? No one can know in advance of its delivery. Will it be true, who would shut out the truth?

“Is there reasonable ground of apprehension that this testimony, if false, would receive undue credit? Is not the danger rather that when it is true, it may not have its just weight? One of the grounds of exclusion is the fear, that being untrue, it will be acted upon as true. The existence of the present laws show how ill founded is that fear. The argument runs thus:—The negro and the Indian are unworthy of credit—all know this—yet for fear all will believe them, we will not permit them to be heard. Hence, whole nations and races are branded in advance, as liars, by statute, and are not even heard.”

Our readers will now be most interested, and best informed of the many changes in the Transatlantic laws of evidence, and of the scandalous laws affecting slaves and persons of colour, by the following abstract:—

“*Revised Statutes of Maine, 1857, chap. 82.*—SECT. 77. No person shall be deemed an incompetent witness on account of his religious belief, but shall be subject to the test of credibility; and any person who does not believe in the existence of a Supreme Being shall be permitted to testify under solemn affirmation, and shall be subject to all the pains and penalties of perjury.

“SECT. 78. No person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event thereof, as party or otherwise, except as is hereinafter provided, but such interest may be shown for the purpose of affecting his credibility.

“SECT. 79. Parties shall not be witnesses in suits where the cause of action implies an offence against the criminal law on the part of



the defendant, unless the defendant offers himself as a witness, and in that case the plaintiff may be a witness, and such defendant shall be held to waive his privilege of not testifying, where his testimony might criminate himself.

“SECT. 80. Nothing in section seventy-eight shall in any manner affect the law relating to the attestation of the execution of last wills and testaments, or of any other instrument, which by law is required to be attested.

“SECT. 81. Where a party to a suit resides without the State, or is absent from the State during the pendency of the suit, and the opposite party desires his testimony, a commission, under the rules of Court, may issue to take his deposition ; and such non-resident or absent party, upon such notice to him or his attorney of record in the suit, of the time and place appointed for the taking his deposition, as the Court orders, shall appear and give his deposition. If he refuses, or unreasonably delays to do so, he may be non-suited or defaulted by order of Court, unless his attorney will admit the affidavit of the party desiring his testimony, as to what the absent party would say, if present, to be used as testimony in the case.

“SECT. 82. When one of the plaintiffs or defendants is used as a witness by the opposite party, testimony may be introduced by his co-plaintiffs or co-defendants to contradict or discredit him, as if he was not a party to the suit.

“SECT. 83. The provisions of the five preceding sections shall not be applied to any cases where, at the time of taking testimony, or at the time of trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party ; but the deposition of a party may be used at the trial after his death if the opposite party is then alive ; and in that case he may also testify.

“SECT. 87. A person to whom an oath is administered shall hold up his hand, unless he believes that an oath administered in that form is not binding—and then it may be administered in a form believed by him to be binding. One not believing the Christian religion may be sworn according to the ceremonies of his religion.

“SECT. 88. Persons conscientiously scrupulous of taking an oath may make affirmation as follows : ‘I do affirm under the pains and penalties of perjury,’ which shall be deemed of the same force and effect as an oath.

“SECT. 89. Persons convicted of an infamous crime, and sentenced in this State, are not competent witnesses, unless restored by a pardon ; and a conviction out of the State, of such crime, may be given in evidence, to affect his credibility.

*“ Acts of 1859, chap. 102.—An Act in relation to the competency of witnesses.—Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows :—*SECT. 1. *In the trial of civil causes, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife.*

*“ Chapter 104.—An Act relating to witnesses and evidence.—Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows :—*No respondent in a criminal prosecution, or proceeding at law, for libel, nuisance, simple assault, simple assault and battery, or for the violation of any municipal or police ordinance, offering himself as a witness, shall be excluded from testifying, and all laws inconsistent herewith are repealed.

*“ New Hampshire, 1853.—*No person believing in a Supreme Being is incompetent on account of his opinions on matters of religion. \* \* \* Members of corporations can be witnesses in cases affecting the interest of corporations.

*“ Vermont, 1840.—*Inhabitants of towns, &c., competent, where such town is party or interested, unless otherwise disqualified.

*“ Massachusetts, 1860.—*‘No person shall be excluded by reason of crime or interest from giving evidence as a witness, either in person or by deposition, in any proceeding, civil or criminal, in court or before a person having authority to receive evidence. But the conviction of any crime may be shown, to affect the *credibility* of any person testifying.

*“ Parties in civil actions and proceedings, including probate and insolvency proceedings, suits in equity, and divorce suits, (except those in which divorce is sought on the ground of alleged criminal conduct of either party,) shall be admitted as competent witnesses for themselves or any other party ; and in any such case in which the wife is a party, or one of the parties, she and her husband shall be competent witnesses for or against each other ; but they shall not be allowed to testify as to private conversations with each other ;* *Provided, That where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, or when an executor or administrator is a party the other party shall not be admitted to testify in his own favour, except in the last-named case, as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator.’*

*“ Rhode Island, 1857.—*Witnesses are not excluded by reason of incapacity from interest. Parties to civil suits may testify, and may.

be compelled to attend, as other witnesses : *Provided*, in suits where administrators and executors are parties, the other party may be called, but he cannot offer himself. Husband and wife are not compelled to testify for or against each other.

"*Connecticut*, 1849.—Persons believing in a Supreme Being are not incompetent, because of religious opinions. (Chap. 10, § 140.) No person is disqualified by interest, as party or otherwise ; or by reason of conviction of a crime ; (the same may be shown to affect his credit.) Sec. 141. The adverse party may be compelled to testify or one having an adverse interest. (See 4 Day, 51 ; 7 C. R. 66.)

"*New York*, 1852.—Witnesses are not incompetent because of religious belief ; nor excluded by reason of their interest in the event of the action. (This is not to apply to a party to the action ; 7 Barb. 120 ; 2 San. 680, 732.) Persons convicted of perjury, or subornation of perjury, are excluded till the judgment is reversed. Persons sentenced upon a conviction of felony are incompetent. Conviction of other offences not to disqualify. Offenders in duelling competent, and may be compelled to testify ; (but such testimony cannot be used against witnesses.) Imprisoned convicts are competent, respecting offences in prisons. Ministers and priests not to disclose confessions made under rules of their denomination. Physicians not to disclose information acquired in their professional capacity ; ( 4 Paige, 460 ; 14 Wend. 637 ; 21 Wend. 79.) Members of corporations, not named in the record as a party, are competent to testify against the interest of such corporation. Creditors are competent witnesses to a will, and admitted to prove the same.

"*New Jersey*, 1847.—Persons convicted of (enormous) crimes, and of larceny above six dollars, are not admitted as witnesses, unless pardoned. Persons convicted of perjury, or subornation of perjury, not admitted, even if pardoned. In actions brought against collectors, sheriffs, &c., for money not paid over, inhabitants may testify 'notwithstanding their liability to taxation, or being interested.' The person whose name is forged is competent, on the trial of an indictment for the forgery.

"*Pennsylvania*, 1857.—Inhabitants of school districts are competent, when the school district, or an officer thereof, is party : also, *generally*, persons are competent, even if the result may increase taxes or diminish the same. The prosecutor on indictment is competent, and the owner of stolen goods, &c.

"*Maryland*, 1840.—No prisoner convicted or attainted of perjury, or subornation of perjury, is received as a witness, until the judgment is reversed. In criminal prosecutions, the testimony of slaves, &c., is received for or against slaves, &c.

**"North Carolina, 1837.**—The testimony of coloured persons is inadmissible against white persons ; but it is admissible against each other.

**"Georgia, 1851.**—Grand jurors are competent to give an account of evidence delivered before them as a body. No one is disqualified as a witness by reason of any religious opinions such person may entertain or express ; (yet his belief may go to the jury to affect his credit.)

**"No attorney** is allowed to give testimony of any matter, either for or against his client, the knowledge of which he obtained by means of their relationship.

**"The prosecutor** may be a witness. Convicts are competent, on trials for the escape or mutiny of fellow-prisoners; (infamy of character or crime shall be exceptions to their credit only.) Legatees are competent witnesses to a will, but the legacies are void. Creditors allowed to testify in proof of will, and their interest only affects their credit.

**"Alabama, 1852.**—SECT. 2302. No objection must be allowed to the competency of a witness, \* \* \* because he has been rendered infamous by a conviction for any crime, (except perjury, or subornation of perjury,) or because he is interested in the event of the suit, or liable for costs, unless the verdict and judgment would be evidence for him in another suit ; but such objection goes only to his credit.

**"SECT. 2276.** *Negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white person, whether bond or free, cannot be witnesses in any cause, civil or criminal, except for or against each other.*

**"Arkansas, 1858.**—Constitution, article 7, sect. 3. No person who denies the being of a God shall hold any office in the civil department of this State, nor be allowed his oath in any court.

**"No minister or priest** is permitted to testify as to confessions made to him, in accordance with the rules of his denomination.

**"Physicians and surgeons** are not to testify as to disclosures of patients. (Sect. 22, chap. 181, Revised Stats.)

**"No attorney or counsellor at law** shall be required or allowed to testify in relation to facts communicated to him by his client, in his professional character. (Revised Stats., chap. 181, sect. 23.)

**"All persons believing the existence of a God** may be sworn, if otherwise competent. (Revised Stats., chap. 120, sect. 6.) **SECT. 7.** And he cannot be required to declare his belief or unbelief ; but the same may be proved by other competent testimony.

"The mother is competent in case of bastardy, (except otherwise incompetent.)

"Persons engaged in duelling are competent witnesses against others.

"The printer or publisher, in case of libel, is competent against the writer of the publication; (but such testimony cannot be received against such witness on his trial.)

"The witness in any cause must answer, though such answer will subject him to a civil suit.

"Negroes and mulattoes are only competent as witnesses in cases where negroes or mulattoes are parties.

"Persons detained in prison may be brought out to testify, on writ of habeas corpus, except where such persons may be imprisoned under a sentence which renders him incompetent to testify in any case. (But *quare*, what crimes make him incompetent?)

"*Texas*, 1850.—Inhabitants of a county are not incompetent when county is a party.

"*Kentucky*, 1852.—The mother of the child and the party accused may be witnesses in bastardy cases, if otherwise competent.

"Persons killing ravenous, mischievous dogs, going at large, may be competent witnesses to make out their justification for doing so.

"A witness in a prosecution for gaming is not excused from testifying on the ground of criminating himself; yet he is discharged from liability therefor.

"Slaves, negroes, and Indians, are not competent, except where they are parties, or the State may be. Indians, however, speaking the English language, and understanding an oath, are competent. No person is incompetent because liable to be assessed for levies for counties, towns, &c. No person incompetent because liable for costs, in common with others assessed for levies.

"In suits at law, either party, at the instance of his adversary, may be compelled to give evidence upon the trial."

"A fiduciary may be a witness when he has no personal interest from being a party to the case, or being liable for costs.

"No person convicted of felony is competent unless pardoned; nor is one convicted of perjury, or subornation of perjury, competent, even if pardoned.

"*Wisconsin*, 1858.—Inhabitants of a county competent when the county is interested.

"The mother of a bastard child is competent, unless otherwise incompetent.

"Members of corporations are competent, where the corporation is interested.

“No person is disqualified by reason of his interest in the event of the suit, as party or otherwise, (excepting in certain suits of administrators, assignees, &c.,) but their interest may go to affect their credit.

“Notice must be given that the opposite party is to testify.

“Party to an action may be compelled to testify by the adverse party.

“Party thus testifying may testify in his own behalf; if he testify to new matter, not responsive to the questions of the adverse party, the adverse party may be a witness respecting such matters.

“No person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof.”

“Physicians cannot be compelled to disclose information acquired in their professional character.

“Witness not excused because his testimony will show him liable for a certain debt.

“*Illinois*, 1856.—In criminal cases, the party injured may testify, unless rendered incompetent by infamy, or otherwise than by interest; yet his credibility is left to the jury.

“No black or mulatto person shall be a witness against any white person whatsoever.

“*Indiana*, 1852.—Persons are not incapacitated by reason of crime or interest. But this shall not render competent a party to an action, or the person for whose use it is brought, or the husband or wife of any such party.

“Children under ten years of age pronounced to be incompetent; if over ten, pronounced to be competent. Persons of unsound mind at the time of being produced are incompetent; but the court may examine persons of tender age and of alleged unsound mind and decide upon their competency.

“Husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication made from one to the other during the existence of the marriage relation, whether called as a witness while the relation exists or afterwards.

“No attorney, physician, surgeon, clergyman, or priest, shall be allowed, in giving testimony, to disclose any communication entrusted to him in his professional capacity, and necessary to the discharge of his duties, except with the consent of the party.

“No want of belief in a Supreme Being, or in the Christian religion, shall render a witness incompetent; but the want of such religious belief may be shown on the trial; and in all questions affecting the credibility of a witness, his general moral character may be given in evidence.

"The party to an action may be examined at the instance of the adverse party.

"*Ohio*, 1854.—No person shall be disqualified as a witness, in any case, action, or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown to affect his credibility.

"Any party may compel the adverse party to testify.

"No party shall testify where the adverse party is executor or administrator of any person, when the facts to be proved occurred before the death of such person; nor shall he testify, unless he gives notice of such intention to the adverse party, his agent, or attorney.

"The following are incompetent :—Persons of unsound mind; children under ten, who appear incapable of receiving facts and relating them truly; husband and wife, for or against each other; attorneys, in their professional capacity, except with their client's consent; clergymen and priests, without such consent.

"*California*, 1853.—No person is excluded by reason of his interest, or on account of opinions or religious belief; but this shall not apply to parties to an action, nor to the person for whose immediate benefit a suit exists. A party to a suit may be examined at the instance of an adverse party and his examination rebutted by adverse testimony. A party examined by the adverse party may be examined on his own behalf, in respect to matter pertinent to the issue; but if he testify to new matter, such adverse party may offer himself as a witness in his own behalf relating to such new matter.

"A party may be examined on the part of his co-plaintiff or a co-defendant.

"The following *cannot* be witnesses :—Persons of unsound mind; children under ten, who appear incapable of understanding facts and relating them; Indians, against white persons; negroes, against white persons; husband and wife, for or against each other, (this does not apply to an action by one against the other;) attorneys, without consent of the client; physicians without the consent of the patient; priest and clergymen, without the consent of those confessing.

"A judge or juror may be called as a witness by either party.

"*New York*.—*Code of Procedure*, 1848, *chap.* 6.—SECT. 344. A party to an action may be examined as a witness at the instance of the adverse party, or any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to

the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission.

"SECT. 345. The examination, instead of being had as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days ; unless for good cause shown, the judge order otherwise.

"But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

"SECT. 346. The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally ; and the examination shall be taken and filed in like manner, and may be read by either party on the trial.

"SECT. 347. If a party refuse to attend and testify, as in the last three sections provided, besides being punished himself as for a contempt, his complaint, answer, or reply, may be rejected.

"SECT. 348. The examination of the party may be rebutted by adverse testimony.

"SECT. 349. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf in respect to the new matter, and shall be so received.

"SECT. 350. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party.

"Chapter 7. SECT. 351. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

"SECT. 352. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness.

"SECT. 353. No person residing more than one hundred miles from the place of examination shall be obliged to attend as a witness before any court or judge, except as provided in section 355.

"SECT. 354. Whenever either party desires the examination of a witness who shall reside more than one hundred miles from the place where the trial or hearing is to be had, he may apply to a judge



of the court for an order to examine such witness. Whereupon the judge, on due proof, to his satisfaction, of the materiality of the witness, may make an order for his examination, at a specified time and place, before the county judge of the county where the examination is to be had, or before a justice of the peace or referee residing therein, to be designated by the judge making the order.

“SECT. 355. A copy of such order shall be forthwith served on the adverse party, and notice of the time and place of examination given according to the provisions of section 374.

“The examination may thereupon be taken by such county judge, justice of the peace, or referee; and being certified by him to have been written and subscribed in his presence, and sworn to before him, and being filed with the clerk, may be read by either party on any trial or proceeding in the action, if the witness be dead, or do not reside within one hundred miles of the place of trial, or be unable to attend. But the court may, on special application, order either party to produce his witnesses, and any such witness, to attend in open court, though residing more than one hundred miles from the place of trial; and after such order is made, the written deposition of any witness so ordered to be produced shall not be read.

“SECT. 356. If any witness served with such order, or an order for his examination out of court, disobey it, he may be punished by the court or judge as for a contempt, and shall be liable to all the penalties to which a witness is liable who is duly served with process for his attendance at court, and neglects to attend.

“*Laws of New York, 1859.—Passed April 16, 1859.*—SECT. 9. Section three hundred and ninety-nine of the Code of Procedure, as heretofore amended, is hereby amended so as to read as follows:—

“SECT. 399. A party to an action or proceeding may be examined as a witness in his own behalf the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person. And when in any action or proceeding the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.

“When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from

him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for ; but such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee, or an executor, or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents is living, and his testimony can be procured for such examination, nor unless at least ten days' notice of such intended examination of the assignor shall be given in writing to the adverse party."

Such is the conflict of laws in the United States. Mr. Appleton enumerates the contradiction of the statutes of the several States as to the admission of proof. The common law and statutory enactments of some of the States prohibit the acceptance of the testimony of persons of defective religious belief, of those who are infamous by reason of conviction, of the parties to a suit and those interested in its event, husband and wife, persons of unsound mind, children under the age of ten years, negroes, mulattoes, Indians and all persons of mixed blood descended from negro or Indian ancestors to the third generation, though one ancestor of each generation may have been a white person, whether bond or free,—none can be witnesses. Neither can an attorney, physician, surgeon, clergyman, or priest, in many States, be permitted to disclose any communications entrusted to them professionally, except with the consent of the party so entrusting, while of those admitted to testify no question can be asked, the answer to which would in the opinion of the witness tend to expose him to penalty, forfeiture, or punishment, or perhaps even to disgrace. There is therefore ample room for further legal reforms in the States, jointly and severally. Mr. Appleton still admits, that the aggregate of exclusions still compare in extent and vie in absurdity with the capricious laws of the Siamese.

Mr. Appleton truly says, that the importance of his subject is commensurate only with the importance of justice itself; and

that without evidence, or with bad rules, the judge of fact is as powerless to do justice as the Hebrew of old was to make brick without the needed straw. He is the first practical lawyer who has applied the reasoning and principles of Bentham to the reform of the laws and rules of evidence.

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#### ART. IV.—THE CONSTITUTIONAL HISTORY OF ENGLAND.

*The Constitutional History of England since the Accession of George III., 1760—1860.* By Thomas Erskine May, C.B. In Two Volumes. Vol. I. London: Longmans. 1861.

WE can have little doubt that the present work, when completed, will add to the already well-earned reputation of its author. Of the great merits of Mr. May's treatise on the Law and Usage of Parliament, it would now be superfluous to speak. As to the extent and depth of his learning, there could be no question, and with regard to his possessing sound judgment and many of the best attributes of the legal intellect, there could be as little doubt. All these qualities are displayed in the present publication, along with others of a still higher description. A just estimate of the general character of the great political cycle which he describes, as well as of the particular events which fall within it, and admirable clearness in the statement of principles and facts, are obvious features of the work; nor is it difficult to discover throughout much sound political philosophy and much wise practical teaching. Although unmistakably on the side of liberty and reform, the author never shows any tendency to degenerate into a mere partizan, or to make over-statements with reference to one side or the other. Throughout that portion of the work before us, Mr. May has strictly acted up to the spirit of impartiality which he professes in his preface,

and we have the utmost confidence that the same course will be pursued in the volume which is to follow. "Continually touching upon controverted topics," he says, "I have endeavoured to avoid, as far as possible, the spirit of controversy. But impressed with an earnest conviction that the development of popular liberties has been safe and beneficial, I do not affect to disguise the interest with which I have traced it through all the events of history. Had I viewed it with distrust and despondency, this work would not have been written.

"The policy of our laws, as determined by successive Parliaments, is so far accepted by statesmen of all parties, and by most unprejudiced thinkers, of the present generation, that I am at liberty to discuss it historically, without entering on the field of party politics. Not dealing with the conduct and motives of public men, I have been under no restraint in adverting to recent measures, in order to complete the annals of a century of legislation." Preface vii.

In every respect Mr. May was well qualified to take up the "Constitutional History of England" at the point where it had been left by Hallam; and the subject well deserved to be treated in a full and elaborate manner. Although the accession of George III. may not present a natural boundary in constitutional history, it unquestionably led to a new policy on the part of the Crown, and may also be regarded as marking the period when, in some respects as a consequence of such policy, new political ideas began to arise among the people. At the Revolution the exercise of the Royal authority was restrained within constitutional limits; but the Crown still remained in possession of all its ancient legitimate power and patronage. As Blackstone has expressed it, "the stern commands of prerogative have yielded to the milder voice of influence." That influence was no doubt much increased by the increase of establishments and of public expenditure—a standing army and a national debt, not to mention more direct means that were employed; and so powerful was it, and so

astutely exercised, that Parliament was entirely under its direction. Up to the time of George III., however, at least from the end of William III.'s reign, this influence had been exercised by the Ministers of the Crown, to whom alone responsibility attached; but the young king was resolved to govern as well as to reign—to become in effect his own minister. Mr. May has forcibly shown the dangers of the course on which the King entered, and has pointed out clearly how it differed from the method pursued before his accession.

“To revert to a polity under which kings had governed, and ministers had executed their orders, was in itself a dangerous retrogression in the principles of constitutional government. If the Crown, and not its ministers, governed, how could the former do no wrong and the latter be responsible? If ministers were content to accept responsibility without power, the Crown could not escape its share of blame. Hence the chief safeguard of the monarchy was endangered. But the liberties of the people were exposed to greater peril than the Crown. Power proceeding from the king, and exercised by himself in person, is irreconcilable with popular government. It constitutes the main distinction between an absolute and a constitutional monarchy. The best and most enlightened of kings governing from above, will press his own policy upon his subjects. Choosing his ministers from considerations personal to himself, directing their acts, upholding them as his own servants, resenting attacks upon them as disrespectful to himself, committed to their measures, and resolved to enforce them, viewing men and things from the elevation of a court instead of sharing the interests and sympathies of the people, how can he act in harmony with popular influences?

“The system of government which George III. found in operation was indeed imperfect. The influence of the Crown, as exercised by ministers, prevailed over the more popular elements of the Constitution. The great nobles were too powerful. A Parliament, without adequate representation of the people, and uncontrolled by public opinion, was generally

subservient to the ministers : but with all its defects, it was still a popular institution. If not freely elected by the people, it was yet composed of men belonging to various classes of society, and sharing their interests and feelings. The statesmen, who were able by their talents and influence to command its confidence, became the ministers of the Crown ; and power thus proceeded from below, instead of from above. The country was governed by its ablest men, and not by favourites of the Court. The proper authority of Parliament was recognised, and nothing was wanting in the theory of constitutional government but an improved constitution of Parliament itself. This system, however, the King was determined to subvert. He was jealous of ministers who derived their authority from Parliament rather than from himself, and of the parliamentary organization which controlled his power. The policy which he adopted and its results are among the most critical events in the history of the Crown." Vol. i. pp. 14, 15.

On the other hand, the accession of George III. may be considered as the period when democratic views and a desire for reform began to arise throughout the community. The opposition under George I. and George II. had consisted of Tories and discontented Whigs. Sir Robert Walpole described the Parliamentary opposition to his government as formed of the Tories, the Patriots, and the Boys. Throughout the country the chief active hostility was shown by the squires and parsons. The contest between parties after the Hanoverian succession had been established, had been a contest for place and power ; and with regard to most, if not all, the questions in dispute between them, they can scarcely be considered as affecting to any considerable degree the real interests of the people. The government of Lord Bute first awakened the spirit of discontent throughout the country, and this spirit was kept alive by the acts of subsequent governments. Though subdued by Mr. Pitt, it had not become extinct, but was ready again to burst forth when the proper time came. It is to this spirit that we owe all the reforms that have since

taken place—the amendment of our laws and the extension of our liberties. To us, therefore, it appears that there is complete unity of action throughout the hundred years of constitutional history embraced by Mr. May's work—beginning with the desperate effort of the Crown to subject the government of this country to a single will, and ending with the triumph of popular influence in the Legislature and the subjection of every department of the State to public opinion.

In the present volume, Mr. May has treated separately the history of the prerogatives, influence, and revenues of the Crown, and of the constitution, powers, functions, and political relations of both Houses of Parliament;—reserving for his second volume, a history of party, of the press and political agitation, of the Church, and of civil and religious liberty. We think, on the whole, that he has wisely deviated from a strictly chronological narrative, although occasionally there is a want of completeness in the views of particular events, and the same period repeatedly passes under review with reference to the different subjects treated of. Still, this is a minor evil, and we think that the gain in point of convenience and completeness is considerable from the method adopted.

With regard to the history of the Crown, during the period to which the work relates, the most important circumstance is the attempt of George III., to which we have already referred, to take the government of the country into his own hands. The first efforts made by the King, during Lord Bute's ministry, were unsuccessful; and even the more skilful mode of proceeding during the administrations of George Grenville and of Lord North did not by any means firmly consolidate the influence of the King. It was by Pitt that the greatest success was obtained in this unconstitutional policy—and even he, perhaps, owed as much to the alarms excited by the French Revolution as to his own ability and determination.

“Such were his talents,” says our author, “and such the temper of the times, that he was able to make even arbitrary principles popular. During his long administration the people

were converted to Tory principles, and encouraged the King and the minister to repress liberty of thought and to wage war against opinion. If the King was no longer his own minister,—as in the time of Lord North,—he had the satisfaction of seeing his own principles carried out by hands far abler than his own. In prosecutions of the press and the repression of democratic movements at home, the minister was perhaps as zealous as the King; in carrying on war to crush democracy abroad, the King was more zealous than his minister. They laboured strenuously together in support of monarchy all over the world, and respected too little the constitutional liberties of their own people.

“Nor did the King relax his accustomed activity in public affairs. From the close of the American war until the breaking out of hostilities with France, his pleasure was taken by the Secretary-at-War upon every commission granted in the army; and throughout Mr. Pitt’s administration,—and, indeed, as long as His Majesty was capable of attending to business—every act and appointment was submitted to him for his judgment and approval.

“And if, during the administration of Mr. Pitt, the King’s independent exercise of influence was somewhat less active, the power of the Crown itself, as wielded jointly by himself and his minister, was greater than at any former period. The King and his minister were now absolute. A war is generally favourable to authority by bringing together the people and the government in a common cause and combined exertions. The French war, notwithstanding its heavy burthen and numerous failures, was popular on account of the principles it was supposed to represent; and the vast expenditure, if it distressed the people, multiplied the patronage of the Crown, afforded a rich harvest for contractors, and made the fortunes of farmers and manufacturers, by raising the price of every description of produce. The ‘moneyed classes’ rallied round the War Minister—bought seats in Parliament with their sudden gains, ranged them-



selves in a strong phalanx behind their leader, cheered his speeches, and voted for him on every division. Their zeal was rewarded with peerages, baronetcies, patronage, and all the good things which an inordinate expenditure enabled him to dispense. For years opposition in Parliament to a minister thus supported was an idle form; and if, beyond its walls, the voice of complaint was raised, the arm of the law was strong and swift to silence it. To oppose the minister had become high treason to the State." Vol. i., pp. 74—76.

The supremacy of the King, established by Pitt, was kept up as long as His Majesty was capable of taking any part in public affairs, and attained its culminating point during Mr. Perceval's administration. So thoroughly were the members of this Government men after the King's own heart, that he no longer required the aid of those "friends" who had in former times been always ready to do him service when occasion required. During the regency and the reign of George IV. the influence of the Crown was still preserved, but the passing of the Catholic Emancipation Act was a proof that at the end of this reign it was no longer such as it had been in the days of the good old King. Since the accession of William IV. the influence of the Crown has ceased to be a ground of complaint, and has been only exercised by the advice of responsible ministers according to the principles of the Constitution.

In the chapter on the House of Lords, Mr. May says: "In 1860, the House of Lords consisted of four hundred and sixty lords, spiritual and temporal. The number of hereditary peers of the United Kingdom had risen to three hundred and eighty-five, exclusive of the peers of the blood royal. Of these peerages, one hundred and twenty-eight were created in the long reign of George III.; forty-two in the reign of George IV.; and one hundred and seventeen since the accession of William IV. Thus, two hundred and eighty-seven peerages have been created, or raised to their present rank, since the accession of George III.; or very nearly three-

fourths of the entire number. But this increase is exhibited by the existing peerage alone, notwithstanding the extinction or merger of numerous titles in the interval. The actual number of creations during the reign of George III. amounted to three hundred and eighty-eight, or more than the entire present number of the peerage." Vol i., p. 235.

It is obvious from this how speedily the peerage tends to reduce itself by merger and extinction, and how necessary frequent creations are to keep it up to whatever may be considered as the proper strength. But that strength, we venture to think, ought to be progressively increased. A small body of peers such as existed at the accession of George III., however ancient their lineage, would be entirely out of the question at the present time, as their relative influence in the community would be very greatly lessened. On the other hand, the more the peerage is extended, the more likely is it to become less exclusive, and to be less impervious to popular influences. Nor ought it to be forgotten that the peerage possesses a very different character at the present day from what it had in former times. As Mr. May says, "It is no longer a council of the magnates of the land, the territorial aristocracy, the descendants or representatives of the barons of the olden time; but in each successive age it has assumed a more popular and representative character. Men who have attained the first eminence in war and diplomacy, at the bar, or in the senate,—men wisest in council, and most eloquent in debate, have taken their place in its distinguished roll; and their historic names represent the glories of the age from which they sprung. Men who have amassed fortunes in commerce, or whose ancestors have enriched themselves by their own industry, have also been admitted to the privileged circle of the peerage. Men of the highest intellect, achievements, and wealth, the peerage has adopted and appropriated to itself; men of secondary pretensions it has still left to the people. A body so constantly changed, and recruited from all classes of society, loses much of its distinctive hereditary character. Peers sitting in Par-

liament by virtue of an hereditary right share their privilege with so many, who, by personal pretensions, have recently been placed beside them, that the hereditary principle becomes divested of exclusive power and invidious distinction." Vol. i. p. 237.

In order to keep up this representative character, it is necessary that continual additions should be made to the peerage. Considering the great increase of this country in wealth and population, and the immense variety of interests on the welfare of which its general prosperity depends, we cannot but think that the representative character of the peerage, although that must now be its chief claim to influence, is still very far from being complete. It cannot be maintained that the House of Lords as at present constituted represents even approximately the political and social views of the people of this country; and irrespective of the interests of any party, we therefore think that the infusion of new blood into that body is highly desirable. It is to be regretted, that when the attempt to create life-peers was found impracticable, as large a number as possible of new creations, for the purpose of increasing the efficiency of the House of Lords as a legislative body, was not made. Mr. May, who has admirably discussed the question of life-peerages, is of opinion that the Crown undoubtedly possesses and has exercised the power of creating such peerages; but that it has so long fallen into disuse, that it could not now be brought into operation without the consent of the Legislature. This, we think, is the sound view of the subject, however much it may be regretted that the scheme did not succeed. Whether the House of Lords would consent to any measure for allowing life-peers to sit in Parliament, may be doubted; but in the meantime we see no reason why the prerogative of the Crown to create hereditary peers should be used in so sparing a manner as it has been for some time.

With regard to the threatened creation of peers to insure the passing of the Reform Bill, Mr. May considers it as one of the

most important constitutional questions which ever arose in our history. Lord Grey, in replying to the Duke of Wellington, who had denounced the scheme as destructive to the constitution of the House and of the country, said, "I ask what would be the consequences if such a prerogative did not exist, or could not be constitutionally exercised? The Commons have a control over the power of the Crown, by the privilege, in extreme cases, of refusing the supplies; and the Crown has, by means of its power to dissolve the House of Commons, a control upon any violent and rash proceeding on the part of the Commons; but if a majority of this House is to have the power, whenever they please, of opposing the declared and decided wishes both of the Crown and the people, without any means of modifying that power, then this country is placed entirely under the influence of an uncontrollable oligarchy. I say that, if a majority of this House should have the power of acting adversely to the Crown and the Commons, and was determined to exercise that power without being liable to check or control, the Constitution is completely altered, and the Government of this country is not a limited monarchy; it is no longer, my lords, the Crown, the Lords, and the Commons, but a House of Lords—a separate oligarchy—governing absolutely the others."

On this the author justly observes: "It must not be forgotten that, although Parliament is said to be dissolved, a dissolution extends, in fact, no further than to the Commons. The peers are not affected by it; no change can take place in the constitution of the body, except as to a small number of Scotch representative peers. So far, therefore, as the House of Lords is concerned, a creation of peers by the Crown, on extraordinary occasions, is the only equivalent which the Constitution has provided for the change and renovation of the House of Commons by a dissolution. In no other way can the opinions of the House of Lords be brought into harmony with those of the people. In ordinary times the House of Lords has been converted gradually to the political opinions

of the dominant party in the State, by successive creations ; but when a crisis arrives, in which the party, of whose sentiments it is the exponent, is opposed to the majority of the House of Commons and the country, it must either yield to the pressure of public opinion, or expose itself to the hazard of a more sudden conversion. Statesmen of all parties would condemn such a measure except in cases of grave and perilous necessity, but should the emergency be such as to demand it, it cannot be pronounced unconstitutional." Vol. i., pp. 262, 263.

In the chapter on the House of Commons, we have a very interesting history of Parliamentary reform. Looking back at the present day, to the system which existed before the Reform Act, it is impossible to understand how it could have been so long endured by the people and so strenuously defended by men of ability and integrity. The system had no doubt been long established, and men's views and habits had been formed with reference to it; but to us who have enjoyed the experience of a more reasonable system, it seems difficult to understand how anything could reconcile men to what was so anomalous in itself, and so manifestly the cause of evil. It ought to be recollected, however, that we who have witnessed the safety with which great political changes may be effected in an intelligent and prosperous community, are not fully entitled to judge of those to whom such changes were unknown, and who were naturally guided by the false analogy of the evils produced by the French Revolution. The passing of the Reform Bill was not only a great step in the way of rectifying and purifying our representative system, but by the success which has attended it, it has put us in the position of being able to contemplate calmly any reasonable change in our institutions that may be proposed, and to consider its merits without fear and without favour. All the changes that have taken place since the passing of the Reform Bill have tended to produce the same feeling; and although the safety which has attended all the great reforms of our time is no argument

for indiscriminate innovation, it certainly puts us in a very different position from those who went before us, with respect to forming a correct estimate of measures for the improvement of our political system.

The last chapter of the present volume is devoted to the relations of Parliament to the Crown, the law, and the people. The different questions connected with the privilege of Parliament, which have arisen since the accession of George III., are carefully reviewed. There are some very excellent observations on strong and weak<sup>d</sup> governments. The difficulties which arise from the increased power and independence of the Commons, and the more direct action of public opinion upon measures of legislation and policy, place ministers in a very different position from what they occupied when they could fall back on the Crown for support. But Mr. May has pointed out what the fate of ministers was when the Crown was more powerful. "The first ten years of the reign of George III. witnessed the fall of five feeble administrations, and their instability was mainly due to the restless energies of the King. Until Mr. Pitt came into power, there had not been one strong administration during this reign. It was the King himself who overthrew the Coalition Ministry, the absolute government of Mr. Pitt, and the administration of 'All the Talents.' For more than ten years after Mr. Pitt's fall there was again a succession of weak administrations of short duration. If the King could uphold a ministry, he could also weaken or destroy it. From this danger, governments under the new Parliamentary system have been comparatively free. More responsible to Parliament, they have become less dependent on the Crown; the confidence of the one has guarded them from the displeasure of the other." Vol. i., p. 466.

Mr. May closes the volume with some judicious remarks on Parliamentary speaking. He reviews the characters of the different orators who flourished during the period to which his work relates, and adverts to the great improvement which has taken place both in knowledge and taste in debate. With

regard to the general standard of debate in the House of Commons, he says:—"If that standard be measured by the excellence of the best speakers at different periods, we have no cause to be ashamed of the age in which our living orators and statesmen have flourished. But judged by another test, this age has been exposed to disparaging criticisms. When few save the ablest men contended in debate, and the rank and file were content to cheer and vote, a certain elevation of thought and language was, perhaps, more generally sustained. But of late years, independent members, active, informed, and business-like, representing large interests, more responsible to constituents, and less devoted to party chiefs,—living in the public eye and ambitious of distinction,—have eagerly pressed forward and claimed a hearing. Excellence in debate has suffered from the multiplied demands of public affairs; yet in speeches without pretensions to oratory are found strong common sense, practical knowledge, and an honesty of purpose that was wanting in the silent legions of former times. The debates mark the activity and earnest spirit of a representative assembly. At all times there have been some speakers of a lower grade, without instruction, taste, or elevation. Formerly their common-place effusions were not reported; now they are freely read, and scornfully criticised. They are put to shame by the writers of the daily press, who discuss the same subjects with superior knowledge and ability. Falling below the educated mind of the country, they bring discredit upon the House of Commons, while they impair its legislative efficiency. But worse evils than these have been overcome, and we may hope to see this abuse of free discussion eventually corrected by a less tolerant endurance on the part of the House, and by a public reprobation and contempt." Vol. i. pp. 494, 495.

There is one subject connected with the present condition of Parliament, on which we should have been glad to know the opinion of one so well qualified to judge as Mr. May. We allude to the preparation of legislative measures. Mr. J. S. Mill, in his recent work on Representative Government, after

showing the defects of the House of Commons in a legislative capacity, and that its proper function, in this respect, is not that of doing the work, but of causing it to be done; of determining to whom, or to what sort of people it shall be confided, and giving or withholding the national sanction to it when performed—proposes that a Commission of Legislation, not exceeding in numbers the members of a cabinet, should be appointed for the purpose of making the laws. This body would not of itself have any power of enacting laws; it would only embody the element of intelligence in constructing laws—Parliament would represent that of will. “No measure would become a law until expressly sanctioned by Parliament; and Parliament, or either House, would have the power of sending back a bill to the commission for reconsideration and improvement. Either House might also exercise its initiative, by referring any subject to the commission, with directions to prepare a law. The commission, of course, would have no power of refusing its instrumentality to any legislation which the country desired. Instructions, concurred in by both Houses, to draw up a bill which should effect a particular purpose, would be imperative on the commissioners, unless they preferred to resign their office. Once framed, however, Parliament should have no power to alter the measure, but solely to pass or reject it; or, if partially disapproved of, remit it to the commission for reconsideration. The commissioners should be appointed by the Crown, but should hold their offices for a time certain, say five years, unless removed, on an address from the two Houses of Parliament, grounded either on personal misconduct, (as in the case of the judges,) or on refusal to draw up a bill in obedience to the demands of Parliament. At the expiration of five years, a member should cease to hold office, unless re-appointed, in order to provide a convenient mode of getting rid of those who had not been found equal to their duties, and of infusing new and younger blood into the body.”—*Considerations on Representative Government*, p. 101.



That some machinery of the kind indicated by Mr. Mill is necessary, there can be little doubt. In former times Parliament was chiefly a controlling body, and legislation strictly so called formed a very small portion of its functions. During the last forty years, however, the legislative business of Parliament has greatly increased, and it is vain to hope that in a progressive community it will not go on increasing. The inefficiency of Parliament, in this respect, is every session becoming more and more apparent; and it is universally felt that something must be done to remedy the evil. The scheme of Mr. Mill will be found more fully developed in the work from which we have quoted. Bearing as it does, like everything which proceeds from him, the marks of an acute and powerful mind, we fear that it rather overlooks the feelings with which Parliament would be likely to contemplate such a proposal. Neither House, we venture to think, would consent to hand over to a commission, appointed by the Crown, any of the duties connected with its legislative functions, and popular feeling would strongly support them in resisting such a proposal. We are bound to confess, however, that we have not seen any plan among the many that have been proposed to which grave objections do not apply. Nevertheless, we are not prepared to say that the matter is beyond all human ingenuity and skill—and we trust we may not be too sanguine in expressing a hope that, in a future edition of his work, Mr. May may have to record the establishment of some system for the improvement of our method of legislation.

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ART. V.—EXTRACT OF A LETTER FROM LORD  
BROUGHAM TO THE EARL OF RADNOR.

“**A**ND I really must admit that the last Session, if it were to be judged by the number only of its measures as compared with former years, would appear to disadvantage. But, then, we are to reckon the value as well as the number; and one is reminded by the season of what all farmers, at least with us in the North, and I take for granted with you also, are dwelling upon, wishing that the ‘yield may be, if small in bulk, yet great in value.’ So we really may say of the legislative yield, that it answered this description: the amendments of the law were not many, but they were of very considerable importance.

The Bankruptcy and Insolvency Act was, with great industry and the skill and learning which might well be expected in that quarter, framed by the Chancellor (Lord Westbury;) and the most material parts were passed. The Lords made considerable alterations, after a full examination of its provisions in a select committee. The principal change was the disallowance of the chief judge, chiefly upon the ground that the appeals were too few to justify the creation of such an office; and so it certainly would stand if no increase were to follow from the great and most salutary provision of the Act, giving jurisdiction in bankruptcy to the County Courts. Whether by a chief judge or by a Court formed of the Commissioners it will certainly be found that some provision is necessary under the new law. Upon this alteration the Commons held out in their difference with our House, and the chief judgeship was given up, though with great reluctance, and after a very powerful defence of his plan by the Chancellor.

Upon the other alteration, in which I can have little doubt

the Lords were right,—the restoring the power of the official assignees,—the Commons showed as much candour and conciliation as we had done upon the chief judgeship. It is devoutly to be wished that the trades' assignees may be found to act in all respects differently from their predecessors before the great change of 1831, which L. Smith declared would occasion a loss to the house of Smith, Payne, and Smith, of three or four thousand a year, the produce of the sums left by trades' assignees in their hands. In the first year or two of their appointment, about two millions were collected by the official assignees, all of which it seems had been wholly lost sight of by the trades' assignees; and in many cases dividends were made of 17s. or 18s. in the pound, after many years had elapsed without a dividend; nay, in one or two instances, the whole debts were paid and the bankruptcy superseded. If the nature of the creditors' assignee is now completely changed, we may have less anxiety about the change which the new Act effects on the official assignee, or if the precautions taken to insure diligence and prevent malversation shall be found sufficient; and I know that the Chancellor feels confident in the security which the Act affords, denying altogether the allegation of the Lords' Committee, that there is a material change in the present system by the proposed one.

It must be admitted that, with all the alterations made in our House, the Act as it passed has been a most valuable improvement. It would be so had nothing more been done than providing a local jurisdiction, enabling creditors to prove in their own neighbourhood instead of being obliged to go perhaps eighty or a hundred miles—a grievance so great that many debts of small amount never were proved at all. But there are other important benefits secured to the creditors, and not the least considerable is the relieving them from the large payment of compensations to the officers who lost their places in 1831, and the holders of the old sinecures, one of which had no less than £7000 a year, which is now transferred to the consolidated fund.

I hardly know if I ought not to reckon the Consolidation Acts even a more important gain to our jurisprudence than the one I have just been considering. Ever since 1831 we had been attempting to form a digest of our Criminal Law. Commissioners had examined and reported upon the subject. Bills had been framed, grounded at least upon their reports; these had been thoroughly discussed in committees of our House; many of them had passed through all the stages and been sent to the Commons, but in vain; for if each of the many hundred clauses were to undergo a scrutiny there, every one saw that no such Bills could pass. There is, as Lord Lyndhurst observed, but one way of having a digest,—confiding in the learned and experienced Commissioners to whom the preparation of it is entrusted, and then examining their work in a select committee of the Lords. At length the Commons have adopted this course, and nearly the whole of our Criminal Law is digested in the five Acts passed. There remains little more than, by a similar process, to digest the important subject of Criminal Law procedure. My hopes are therefore sanguine, which I cherished thirty years ago when I sent this subject to a Commission; and the long course of disappointment is happily at an end, when Sir F. Kelly can declare his hopes, hitherto frustrated in presenting his ably-framed Bills, that they would reduce the forty volumes of our Statute Law to four.

Those Bills of this able and learned person were not his only service last Session. He proposed a Bill for removing the defect of our law as to wills of British subjects residing in foreign countries. It was a more extensive measure than Lord Kingsdown's, which passed, and is of considerable value, and removes a great part of the defect complained of.

Lastly, there was an important Act on the Poor Laws, passed upon the proposal of Mr. Villiers, reducing the time for giving a settlement from five to three years, extending the residence required over the whole union, and making a more equal distribution of the payment of rates.

Beside stating the expectation that this will be followed by others, removing all that remains defective in the Law of Settlement, I may well declare a like expectation of the results from the Commission issued upon Lord Clanricarde's motion for inquiring into the differences between the law of Ireland and ours, in regard to judicature and judicial procedure. When he made his able and useful statement of these diversities, I was induced to remark, that without waiting for the report of the Commission, one part of our system might well be extended to the sister kingdom—the department of judicial statistics—which, without any new law, might be done by an order from the Home Office, and would entail no further cost than the appointment of an additional clerk. He at once agreed to the proposal; and I have since had the satisfaction of learning that the Government has lost no time in acting upon the suggestion.

Thus we may really feel less cause of complaint than in former years, with regard to measures of Law Amendment, the first and most important branch of Social Science, if I may still use the term,—which I am somewhat surprised to see an ably and learnedly conducted journal arraign as the greatest of absurdities, inasmuch as they say it has no existence, nay, that there can be no such science. My surprise is all the greater that I find, in the same quarter, lavish praise bestowed upon the sister Association of British Science, and its proceedings of last month, one considerable portion of which consisted of papers read on the very same subjects that were discussed at our Dublin Congress the month before; nay, one, perhaps the most important paper read—being elaborated by one of our committees, and leave given by our council to read it at Manchester.\* But there is no such thing as *Social*

\* Lord Brougham, we believe, alludes to the Report and Resolutions on the Patent Law, prepared by a Committee of the Social Science Association, and presented to that body at Dublin. The Report was of so valuable a nature, and its framers (The Right Hon. Joseph Napier, Lord Stanley, General Sabine, Mr. Grove, Q.C., Mr. Thomas Webster, and others) are so universally recognised as authorities on the various questions with which it deals, that the British Association asked leave to present the Report to

*Science* it seems! When you and I were, nearer seventy than sixty years ago, studying at Edinburgh, this had not been discovered. When Playfair taught the mathematics and D. Stewart mental philosophy, it was well understood that those sciences did not relate to men as members of society, but could be learnt by the individual and of the individual; and that when D. Stewart lectured on political economy, he taught a science which regarded men in their social state—a social science. But not only economics belongs to this class. The whole of jurisprudence, in all its branches, both the law, the procedure, its promulgation, and its execution, is most strictly a science, the result of experience, that is, of induction. Whatever relates to the prevention of crime and the reformation of criminals depends on principles which are an important branch of science, social in the strictest sense of the term. Of the whole subject of education, the same may be said, and, in truth, of all that occupies the Association at its yearly congress. That many papers are read, and much discussion takes place, in an unscientific form, is true, and is inevitable; and so it happens to the British Association, even on subjects unconnected with social science. And yet the objectors do not deny the name of scientific to that Association. It may be mentioned that, two years before our Association was founded, they had established a society at Paris for investigating '*La Science Sociale*,' and this was unknown to us till after ours had been in operation a year or more—though our good neighbours have taken credit in the last report of their society for having originated ours. But the fact of their having as well chosen the same name, without any concert, is a proof that there was some reason for our choice of it.

Whatever be the name, or however loose its application occasionally may be, the vast importance of the subject no one of their members at Manchester. The Council of the Social Science Association at once, and most cordially, acceded to the proposal, and an interesting discussion was the result. We trust these two great Associations will always act together in a similar spirit.—ED. L. M. & L. R.

can question; and I rejoice to think that the next meeting of our Association will be held in London, and upon a greater scale than before. Not only will the meeting be attended by representatives of Social Science from all parts of the kingdom, but it is expected that an international character will be given to the assemblage by the presence of a large number of the most eminent economists and philanthropists of continental countries. Sanguine hopes are entertained on this point, more especially as the authorities of the city are expected to take an active share in the preparations.

But here are we discussing the proper designation of it, when all social science is exposed to peril—at least, to general obstruction—by the unfortunate condition of the world, Old and New. Our kinsmen in America are bringing all free institutions into discredit, and their irrational state of mind on both sides will only be cured by the taxes and the bankruptcies to which it is leading, a cure that will unhappily come too late, while the dreadful calamity of civil war is wasting their blood as well as treasure. The senseless abuse lavished on us for our neutrality, the best service we can render them, may be freely forgiven, proceeding, as it does, from the slander, the delusions, —not to say falsehood—and the bluster of a mob-ridden press, with whose offences we have no more right to charge the countrymen of Washington and Franklin than to accuse our neighbours, countrymen of Lafayette and Lavoisier, of the atrocities that made the Heberts and the Marats hateful as well as despicable. Let us, however, be devoutly thankful for the happy constitution that protects us from the countless ills of anarchy and mob government, between which and despotism our kinsmen have lately been vibrating. Our safety will endure so long as we keep in mind the most sacred rule of civil polity, and withhold all power from those who have no effectual—that is, no individual—responsibility. In repeating now what was written many years ago, I am stealing from myself; but this is venial—at least it bears the same relation to theft that suicide does to murder. In the Old World things are

very far from being in so disastrous a state, but they are far from causing no uneasiness. Let us hope that M. Chevalier's alarm may prove groundless, which he expressed two years ago at our Bradford Congress, when he dreaded that the enemy of mankind might be able to tempt his countrymen with a laurel. I trust they may long resist his arts, and that the heavy costs of warlike preparations in the midst of peace may no longer oppress the people, not only of England, but of Europe."

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ART. VI.—BELLIGERENT RIGHTS AT SEA.—  
LETTER FROM THE HON. W. B. LAWRENCE.

THE following letter was addressed by the Hon. W. B. Lawrence, of Rhode Island, recently ambassador to this country from the United States, and eminent for his acquirement in public law, to Mr. John Westlake, the secretary of the International Law Department of the Social Science Association. At a time when the question of belligerent rights is exciting universal attention, it is particularly interesting to hear from such an authority as Mr. Lawrence a statement of the American view of the subject, and to learn the history of the negotiations carried on between the Governments of Europe and America. The letter did not reach Mr. Westlake in time to be read at the Dublin meeting of the Association; and with his permission, and that of the authorities of the Association, we now give it *in extenso* to our readers:—

Ochre Point, Newport, R. I., July 28, 1861.

MY DEAR SIR,

When I looked on the programme of the International Department of your Association, I selected from the topics of discussion that of "Rights of Belligerents over Private Pro-



perty at Sea." The position in which every American now finds himself, and which compels him to view all questions of public law not in their strictly international relations, but as connected with the existence of civil war, may well embarrass every attempt at free discussion. However any individual may endeavour to hold himself aloof from the popular excitement, and though he may not see in the alleged causes which divide his countrymen any apology for the sacrifices of blood and treasure to which the two sections are madly subjecting each other, it is not during a fratricidal strife that we are to look for any practical efforts towards carrying out the policy so happily inaugurated during your late war with Russia, making war a contest between state and state, and exempting, as far as practicable, from its evils all the population not directly connected with the belligerent operations. Appreciating, as I do, the considerations which have led the Governments of Europe to a declared neutrality in our pending domestic contest, as well as the advantage which the United States practically derive from a course which, instead of leaving their ports (as without any violation of international obligations they might have done) open to the prizes of both parties, excludes both, I shall, in any remarks that I may make on the proposed subject of discussion, endeavour to avoid all reference to the calamitous condition of our political affairs.

So far had the idea been carried, that by the very existence of war the people of two nations become individually enemies, that all contracts between them were deemed to be *ipso facto* dissolved. So late as the war of 1812 it was for the first time, as far as my recollections extend, judicially expounded, that a commercial partnership was thus terminated. The case was decided in the New York Court of Errors, the American commentator, Chancellor Kent, giving the controlling opinion. While both parties declared the right of a state to confiscate the private property of enemies found in the country, the only difference between the American and English Courts was, that the former deemed a legislative act necessary for the purpose,

while the seizing of all ships in port at the commencement of hostilities was regarded by the latter as a royal prerogative. The rule by which debts are suspended during the war, reviving at peace, was a modification of the right of confiscation in favour of the Government which is not only theoretically claimed, but sometimes exercised, as by Denmark, in 1807, in retaliation for vessels and other property condemned as *droits* of Admiralty.

The early wars of the French Revolution, involved as they were with civil war, and the pretension of intervention on the part of the other European powers, were in their character exceptional. French publicists place in the same category with the confiscation of private property found in British ports, the detention, on the rupture of the peace of Amiens, of individuals who had gone to the Continent before the commencement of the war for purposes of pleasure or private business.

In the wars of the French Revolution, not only were neutrals exposed to all the embarrassments connected with "visitation and search," and subjected to capture under paper blockades of the two great belligerents, now universally admitted to have been in violation of international law; but, through licenses issued by both of them to an enormous extent, they conceded to one another an extended trade, not only with their European territories, but with the enemy's colonies, from which the British Courts would have excluded those states not engaged in the war, to whom under municipal regulations it had been denied in peace.

The half-century which elapsed since the reconstruction of Europe by the Treaty of Vienna, while marked by the greater destructiveness imparted to the instruments of warfare, could scarcely have failed to effect some modifications in the belligerent code, if not as regards the subjects of the contending parties, at least in mitigating the inconveniences of war to those, who, without any fault of their own, were made to suffer from the acts of others.

The conflicting views previously held in reference to neutrals

by the two great allies in the war against Russia rendered necessary, at least, a temporary compromise of principle. Recurring to their former systems, it is very evident that if two nations situated like England and France—the one possessing the largest military marine in the world, the other having a navy only inferior to that of its ally—had, as co-belligerents, determined each to maintain its own peculiar views, neutral commerce would have altogether ceased. The property of a friend, which England would not have condemned for having been found in an enemy's vessel, would, as partaking of the character of the flag, been good prize to a French cruiser, while the neutral ship, whose flag would have been a protection against France, would have been subjected to be searched by English officers for enemy's property—the mere suspicion of having it on board being sufficient to cause her to be sent into an English port. Not only was the severity of the old codes mitigated by the declarations of England and France that “free ships make free goods,” or, in other words, that enemy's property laden on board of neutral ships should pass free, while neutral property in enemy's ships remained exempt from confiscation, contraband of war in both cases excepted, but the prohibition of the enemy's colonial and coasting trade, not open to neutrals in time of peace, known as the rule of 1756, was wholly superseded, and neutrals were allowed to trade to all parts and places wheresoever situated, not in a state of blockade. Indeed, so far as colonies were concerned, the rule in the case of Russia was necessarily without application; and as England, whose colonial trade had previously been made free almost simultaneously with the order in council of April 15, 1854, opened by Act of Parliament her coasting trade to the ships of all friendly nations, the theory of the restriction in question, even as to her, could no longer have had any basis.

Nor were the benefits of the reforms in the old mode of warfare confined to neutrals. I have already alluded to the course of England in the preceding maritime wars of the present century, of seizing and condemning, as *droits of Admiralty*, vessels

and other property found in her ports at the commencement of hostilities. In the late war ample time was allowed by all the belligerents to the merchant vessels of their enemies in their ports to quit them with their cargoes. A subsequent order not only authorized a neutral trade in neutral ships with the enemy's ports, but it was allowed to be carried on by British subjects, provided neutral vessels were employed—the only restrictions on such trade being that it should not extend to contraband, or articles to export which required a special permission, or to a violation of a blockade, and that British ships should not be permitted to enter a port in the occupation of the enemy. In these respects there was no important distinction between the ukases of Russia and the orders and decrees of England and France.

Indeed, both as regards enemies and neutrals, except that the merchant vessels of a belligerent could not enter the ports of its enemy, the trade of the world was scarcely affected by the pending hostilities. The effect of the British order in council, and which was only of the same import with the corresponding French decree, was to leave the trade of England with neutrals, and even the indirect trade with Russia, in the same state as during the peace, so far as the law of the Courts was concerned. By the Russian declaration also, English and French goods, even though they belonged to subjects of those countries, were allowed to be imported under neutral flags, in accordance with the usual custom-house regulations. The doctrine of illegal trade with an enemy, to which theretofore the penalty of confiscation was attached, had thus no existence.

Nor was the operation of these measures on the rights of neutrals unnoticed during the pendency of the war. They were, with a knowledge of their consequence, sustained in the British Parliament by the ministers of the day. Lord Clarendon early declared to the American minister in London that, though professedly only temporary, the precedent could not be departed from in future wars. When at a later period

complaint was made of the benefit accruing to Prussia from the indirect trade through her with Russia, it only led to an exposition, on the part of the President of the Board of Trade, of the effects of former attempts to crush commerce in time of war, showing that "they had fostered immorality, fraud, and perjury."

The preceding reference has been made to the relaxations introduced during the Russian war into the relations of the belligerents with one another and towards neutrals, with a view to a proper appreciation of the action of the Congress of Paris. The obvious motive of the declaration of maritime principles was to extend and perpetuate that liberal policy which had to a great extent continued, during a period of war, the usual commercial intercourse of peace, confining to the State the evils incident to hostilities. It was, therefore, not requisite to make any further material changes in the practice of nations, in order to attain the full accomplishment of that to which the "declaration" would seem to have been directed—the entire separation from the producing classes of those whose appropriate functions are the business of war, and exempting the former from all the consequences incident to hostilities. The necessary result of this doctrine in practice would be the immunity of private property at sea, as well as on land.

So far as respects three of the articles of the "declaration," there was no ambiguity. They were confirmatory of the principles acted on during the war. The rule that the neutral flag covers the enemy's goods, and that the goods of neutrals are not liable to capture under the enemy's flag, with the exception in both cases as to contraband, had, moreover, been, pending the war, made the subject of a convention between the United States and Russia. And as Spain and Mexico were, with the United States, the only powers that did not give their assent to the entire declaration, it may not be irrelevant to notice that a treaty, to the same effect as the one with Russia, was concluded by the United States with Mexico, and that, according to the construction given by the Supreme

Court to the subsisting treaty with Spain, its provisions on these points are equivalent. As was justly observed by the American Secretary of State, "If there have been any disputes in regard to blockades, the uncertainty was about the facts, but not the law." That in order to be binding they must be effective, whatever exceptional cases had existed in practice, was, at least, recognised in theory.

The proposition for the abolition of privateering was a mistake, in confounding one of the means for the accomplishment of an object with the end to be attained. That the entire immunity of private property at sea would follow as a necessary consequence from the abolition of cruising by private owned vessels would seem to have been the impression of those who, long before the Congress of Paris, advocated that proposition. If that is not to be the case, the article is without object. It is fair, therefore, to presume that it was based on the supposition that, when there no longer exists a class of men to whom depredation on private property is the appropriate vocation, the right of capture of merchant ships, now exercised by the officers of the regular navy, must yield to the sentiments of an advanced civilization. Consequently, the addition which Mr. Marcy proposed to make to the privateer clause, viz., "that the private property of the subjects or citizens of a belligerent on the high seas should be exempted from seizure by public armed vessels of the other belligerent, except it be contraband," is a legitimate development of the true spirit of the "declaration."

That the immunity of private property from all capture at sea has ever been deemed identical with the abolition of privateering, and the prohibition of letters of marque has always been sustained by arguments applicable to the general question, a reference to the writings of publicists who have discussed the subject, as well as to the language of treaties, will abundantly show.

The Abbé Mably, who is usually cited as the earliest author on public law who called attention to the matter, prefaces his

condemnation of all captures of merchantmen and of private property at sea by inquiring why, when two nations go to war, they should interdict all reciprocal commerce, and declaring that the doing so is the remains of ancient barbarism.

Galiani, though he speaks of the privateersman, (*armatore*,) does so only to oppose him to the military leader on land in reference to the treatment of private property.

It is sometimes supposed that Dr. Franklin and the King of Prussia were anticipated in their philosophical views by a convention made as early as 1675, between Sweden and the United Provinces. I have found this treaty of commerce, which is based on the immunity of trade, in Dumont, as in the "*Actes, &c., de la paix de Nimègue.*" It was concluded during the pendency of a war, and reciprocally stipulates, as a means of avoiding annoyance to merchantmen and other property at sea, for the withdrawal of vessels furnished with the commissions of the two powers, and prohibits their subjects from taking commissions from other states to the prejudice of their commerce. By the recitals in the treaty of peace, two years afterwards, it appears the convention had never been practically observed.

It is often alleged that inasmuch as it was scarcely possible that the United States and Prussia should be brought into hostile collision, the philanthropical provision inserted in the treaty of 1785 was merely one of those declarations in which speculative theorists might safely indulge. The sincerity of Dr. Franklin is best shown by the earnestness with which he pressed on Mr. Oswald, the negotiator of the first British treaty with the United States, the introduction of a similar article. Nor is it a slight confirmation of the views that I have endeavoured to express, that the abolition of privateering and the immunity of private property have been treated as indissolubly connected, that, though in all his letters he refers in terms merely to the former, both in the draft for the British treaty and in the article of that with Prussia, the specific clause against granting commissions to private armed vessels

is a corollary to the exemption, expressed in the broadest language, of private property from injury or destruction, and of persons employed in the various peaceable pursuits of life from all molestation or inconvenience.

The first article of the French decree of 1792 proclaimed the immunity of private property at sea, the second the abolition of privateering; and the executive authority was requested to negotiate with foreign powers on this basis. The proposition was only responded to by the City of Hamburg.

The negotiations instituted by the United States with the different governments of Europe in 1823-4, and which were ineffectually renewed some years later with England during my connexion with the mission to your country, though popularly regarded as connected with privateering, had for their object the entire abolition of private war on the ocean.

In proposing a new rule of international law, which can only be binding by obtaining an universal assent, it is not to be supposed that it can be so framed as to promote special interests, or that any one nation is to derive benefit from it to the prejudice of another. Unless the Government is entirely separated from the individuals of the nation, and war confined to the former, the effect of surrendering the right of granting commissions to private armed cruisers would be to place the commerce of the world at the mercy of the power having the greatest military marine. If the consequence of the "declaration" was to be, to increase the maritime preponderance of Great Britain and France, without even benefiting the general cause of civilization, (as their public ships would retain the right of capturing private property, while the United States, with a superior mercantile revenue, but comparatively without a navy, would be divested of all means of retaliation,) it could hardly have been supposed that the measure would receive the necessary sanction. Indeed, the protocol of the Congress expressly declares that it would not be obligatory on the signers to maintain the principle of the abolition of privateering against those Powers which did not accede to it. That the



American amendment was necessary to give to the "declaration" of Paris full effect was soon recognised by most of the European Governments, as I have reason to know from the perusal of the papers in the Department of State at Washington, which were placed at my disposition by the last Administration, with a view to the preparation of a second annotated edition of "Wheaton's Elements."

Among the minor maritime States there was a clear unanimity of sentiment, but they naturally awaited, before giving a formal reply, the answer of the Great Powers.

The adhesion of Russia was promptly rendered. Prince Gortschakoff instructed, so early as September, 1856, the Russian Minister at Washington, to communicate to Secretary Marcy a copy of his instructions to Baron Brunow. Their emphatic language induces me to insert an extract—"Your Excellency will have an opportunity, in Paris, of taking cognizance of Mr. Marcy's note, in which the American proposition is developed in that cautious and lucid manner which commands conviction. The Secretary of State does not argue the exclusive interests of the United States; his plea is put for the whole of mankind. It grows out of a generous thought, the embodiment of which rests upon arguments which admit of no reply. The attention of the Emperor has, in an eminent degree, been enlisted by the overtures of the American Cabinet. In his view of the question they deserve to be taken into serious consideration by the Powers which signed the Treaty of Paris. They would honour themselves should they, by a resolution taken in common and proclaimed to the world, apply to private property on the seas the principle of inviolability which they have ever professed for it on land. They would crown the work of pacification which has called them together, and give it an additional guarantee of permanence. By order of the Emperor you are invited, Baron, to entertain this idea before the Minister of Foreign Affairs, and to apprise him forthwith that should the American proposition become the subject of common deliberation among the Powers,

it would receive a most decisive support at the hands of the representative of His Imperial Majesty. You are even authorized, Baron, to declare that our august master would be disposed to take the initiative of this question."

The American Minister at Paris was assured by Count Walewski, in November, 1856, that the French Government would agree to the "declaration" as modified by us, though a formal assent was deferred with a view to consultation with the other parties to the Treaty of Paris.

Prussia formally announced, in May, 1857, to Mr. Cass, Secretary of State, who had replaced Mr. Marcy, that the Cabinet of Berlin gave its adhesion to the proposition made by the President of the United States to be added to the principles agreed on at Paris, declaring at the same time that "if this proposition should become the subject of a collective deliberation, it can rely on the most marked support of Prussia, which earnestly desires that other States will unite in a determination, the benefits of which will apply to all nations."

Instructions had been given by President Buchanan to suspend negotiations, as was stated by Lord Palmerston in a debate in Parliament, in July, 1857, before any official action was taken by the Government of Great Britain. Lord Palmerston, whatever changes his opinions may have undergone, had expressed himself favourably to the proposition at a public meeting in Liverpool; and we have, in the following despatch of Count Chreptovitsch, a further evidence of the interest which Russia took in the establishment of the principle. "I have," he says, writing under date of November 3rd, (15,) 1856, "improved a favourable opportunity to converse with Lord Clarendon in relation to the condition which the Cabinet of Washington appends to its accession to the principles of maritime law, embodied in the declaration of 11th (16) April, and have delivered to him a copy of your Excellency's despatch under date of 1st September. The Premier, in answer to my communication, stated to me that Her Majesty's Government recognised as a principle the equity of the amendment pro-

posed by the American Government, and that he saw no objection to make it the subject of a joint deliberation. He, however, added, that in the examination of the details of the question, it might find itself under the necessity of stipulating for certain reservations, which would be submitted at the proper time and place to the judgment of the Powers that are called to discuss the matter."

Whether the withdrawal of the Marcy amendment by the late administration arose from a belief that the United States could not, in any event, surrender "a mode of maritime warfare" held by the then Secretary of State "to be peculiarly adapted to their condition and pursuits, and essential to their defence upon the ocean," or whether it was thought, as was intimated by President Buchanan to the New York Chamber of Commerce, that the right of blockade, even as defined in the "declaration of Paris," would render inoperative the promised advantages to the pacific commerce of belligerents, is a matter which in no wise affects the principles of this discussion. I likewise abstain from adverting to the policy, of which I know nothing except from rumour, of the present Cabinet of Washington, which, it is said, repudiates the acts of its immediate predecessors, without, however, reviving the proposition which four years ago had so nearly united the suffrages of Christendom.

The restoration of the rule, sustained by the earlier writers, of restricting blockades to places actually besieged, was also connected by the senate of Hamburg, with their late proposition for the immunity of private property at sea. Such a measure is necessary to the perfection of a system which would confine war to military operations, and is demanded not more for the interest of the peaceable inhabitants of the belligerent state than of neutrals. "The investment of a place by sea and land," said Mr. Cass, in his instructions for concluding maritime conventions in 1859, "with a view to its reduction, preventing it from receiving supplies of men and material for its defence, is a legitimate mode of prosecuting

hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes; but the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and, from its very nature, against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times." In looking, however, to the practical bearing of this matter, it is proper to remember that there is little danger of the paper blockades of the early part of the present century, which professedly retaliated on neutrals the alleged violations by the respective belligerents of the principles of international law, being hereafter resorted to by European Powers. The decisions of the English Courts, and they were in accordance with those of the French tribunals, during the Russian war, were well calculated to put an end to all attempts to place under an interdict, by a Cabinet notification, the entire coast of an extensive territory. I refer particularly to the decision of Lord Kingsdown in the *Francisca*, where it is declared that the notice of a blockade cannot be more extensive than the blockade itself; that a belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy when, in truth, he has only blockaded one; and that a neutral, in such a case, is not liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which is really blockaded. Moreover, since the peace, Sir Charles Napier, who must be an authority on such a subject, stated in the House of Commons, that double or treble the whole British navy would not be sufficient to make such a blockade of all the ports of France as would conform with the requirements of the "declaration."

In this connexion it may not be irrelevant to allude to the exception from immunity of contraband, contained as well in Mr. Marcy's amendment, as in the articles of the "declaration" referring to the cargoes of neutrals and to neutral

property in an enemy's vessel. If the principle of contraband is still to be maintained, it is not little to be regretted, that in a solemn instrument, intended to settle the uncertainties of maritime law, it should have been left wholly undefined. On no point is there a greater diversity of opinion than with respect to the extent of its application. By the adoption of the rule that a neutral flag protects enemy's goods, there is no longer any pretence for the existence of the right of search, unless as connected with contraband. Nor does there appear to be any advantage to the belligerent in the continuance of the rule of contraband, commensurate with the injuries which it must inevitably cause to the neutral in the detention of his ship and the interruption to his trade, and from the collisions between neutrals and belligerents, to which the exercise of the right of search must inevitably give rise. As destination to an enemy's port is an essential point in a question of contraband, in all cases where the rule is of any practical importance to a belligerent, the law of blockade, even though that right should be restricted to places actually besieged, would also intervene.

I have already remarked that, unless the abolition of privateering had in view the immunity of private property, it was without object. Moreover, no new rule can stand the test of international morality unless it confers equal advantages and imposes equal obligations on all states, great and small. The immunity proffered must be a defence as well against the spoliation of an enemy possessed of a great military marine, as of a state whose resources are confined to her mercantile navies. The article under consideration, in the terms of the "declaration," can only, like the denunciation of the slave trade by the Congress of Vienna, address itself to the consciences of the Powers. That matter required, to give it any practical effect, special conventional stipulations, followed by legislation; and though, by a gross misnomer, the term "piracy" was applied to its infraction, the statute offence is distinguished from the crime of the same name under the law

of nations, which was everywhere justiciable. The phrase, "*La course est et demeure abolie*," Lord Colchester in an early debate remarked, had been rendered by an English writer on international law, "cruising is and remains abolished." That would, of course, extend to the immunity of merchant ships from public as well as private vessels of war, if it did not abolish maritime war altogether.

Capturing private property at sea, without a commission from some authority, is piracy; but it is not necessary that a Government, in order to enjoy belligerent rights, should be formally recognised by any other Power, and among these rights is that of issuing letters of marque and reprisal.

Whether any case is within the principle of the arrangement of Paris, every nation, to which a vessel belongs, must decide for itself, subject of course to complaint on the part of the other contracting parties; but no State can undertake to outlaw a cruiser of another power provided it has a commission from a *de facto* Government, for any infraction of the article against privateering. It is not to be presumed that the Congress of Paris undertook to determine the form to be given either to the military or naval organization of the respective parties to the "declaration." What species of property shall be exposed to hostilities is a matter which comes home to the interests both of neutrals and belligerents, and it may be a subject for conventional regulation; but so far as principle is concerned, it is certainly of little importance whether a war is conducted by vessels owned by individuals and chartered by the Government, or whether they have been originally constructed in the public yards. It is well known that at one period France was in the habit of making arrangements with corsairs of other countries, as well as her own, to carry on public wars. There is, it is believed, a clause in the contracts which the British Government has with its Transatlantic steamers for the conversion of them into vessels of war, and at this moment the Congress of the United States is deliberating on authorizing the employment of merchant ships to enforce

the measures of coercion now going on towards the seceded States, and on the establishment of a volunteer navy, the commissions in which, like those of the volunteers on shore, are to be temporary and confined to the immediate service. Can any one doubt their right, were the United States to become parties to the "declaration," of employing their volunteer navy for any purpose, even for the capture of private property, in which the public vessels of other nations might properly be engaged?

It has been, I am aware, alleged as an objection practically applicable to privateers, that their officers are ordinarily of a less elevated class than those of ships of war, and that, therefore, there is danger of a greater abuse of their power of visitation. It is sufficient that the responsibility of a nation is as much pledged for the observance of the law of nations by the one as by the other species of force. Nor is it to be forgotten that it is to public cruisers, and not to privateers, that the cruelties at different times inflicted by the destruction of the establishments of unarmed fishermen are to be ascribed. From what has been stated it may be inferred that the "declaration" as to privateering in its present form, so far from being operative, would only give rise to new complications and charges of evasion; while, if the reform was addressed to the immunity of private property in its extended sense, there would be nothing to interfere with its application.

Though the proposition for exempting merchantmen from capture by public ships was withdrawn by the Government of the United States, it was revived in 1858 by another American State. Brazil proposed that "all private property, without exception of merchant vessels, should be placed under the protection of maritime law, and be free from the attacks of cruisers of war." The subject was subsequently, in consequence of the movements of the commerce of Hamburg and Bremen, greatly discussed by the publicists of Germany, and in the Chamber of Deputies of Prussia. Being in Germany at the time, I had an opportunity of appreciating the

importance thus attached to it, even by those States which did not themselves possess a commercial marine, but whose manufactures, exported from Bremen and Hamburg, were subject to the dangers and embarrassments which attach to neutral property in time of war. Count Rechberg assured me that, though little of the Austrian commerce passed through their port of Trieste, yet that he placed such a value on the exports and imports to and from the United States and elsewhere through the Hanse Towns, that should the subject come before an European Congress, it would receive his support.

The publicists, who have discussed this topic, have in general sustained the cause of reform, but I have within a few months received a pamphlet of a contrary import, ("*Propriétés privées des sujets Belligérants*,") from M. Hautefeuille, the learned author of several treaties on maritime law. M. H. has ever been opposed to the abolition of privateering, which measure he deems to have been brought forward in the interests of England, while he ascribes the proposal of the immunity of private property at sea to a profound American policy, which President Buchanan's attempted negotiations as to blockades would only have rendered more complete. He entirely mistakes the scope of the Marcy amendment, which was intended to conciliate, as far as practicable, the supposed demands of humanity with what was due to the safety of the United States. No one doubted that in acceding, even with the amendment, to the "Paris declaration," this country would be abandoning the most efficient of its belligerent resources. M. Hautefeuille's argument is based on controverting what he deems the false assumption that private property on land was free from belligerent capture, and denying that its immunity either at sea or on land is demanded by any considerations of humanity. My time will not permit me to follow M. Hautefeuille in his elucidations. It may be remarked, as to his first point, that any inaccuracy of the advocates of exemption from capture at sea, with reference to



the existing rule as to the land, can in no wise affect the principle, except to include, if he is correct, the latter in the proposed reform. The treaty, as our author fully admits, of 1785, between Prussia and the United States, in its explicit provisions, both as to sea and land, left nothing to be supplied in this respect. M. Hautefeuille contends that the evils of war are to be estimated by its duration, and that the more destructive its operations are, the more it is brought home to all classes of the community, the more is the cause of humanity promoted. Without derogating from this course of reasoning, illustrated by the short Italian campaign, with its bloody battles of Magenta and Solferino, it is to be noticed that the absence of commerce and the stagnation of affairs enumerated by him, are among the consequences of war, which it is the object of the proposed plan, at least, to diminish. M. Hautefeuille's argument, taken in its fullest extent, would ignore all the changes which the civilization of centuries has introduced into the conduct of war. Neither the exchange nor ransom of prisoners would be tolerated, but slavery or death would be the lot of captives.

I have written thus much, *calamo currente*; and as it is only possible that, even if sent to the post-office at once, it will reach you in time for the proposed meeting, I have no opportunity for corrections, much less for transcribing. You will receive the note in its rough form, as an evidence of my desire to respond to your flattering invitation.—Believe me, my dear sir, yours very truly,

W. B. LAWRENCE.

John Westlake, Esq., &c.

I might have referred as authorities to the recent German publicists, who, so far from according with the doctrines of Hautefeuille, contend for strictly confining war to the hostilities between state and state. Among them Heffter, on the authority of Zachariæ, maintains that in the absence of express provisions, the modern laws of war prohibit any prejudice to

the individual rights of the enemy's subjects, and that they are no longer opposed to their claims being regularly prosecuted before the competent tribunals. The French translator, Bergsen, earnestly supports the principle of the Marcy amendment.

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ART. VII.—JOURNAL OF A GLOUCESTERSHIRE  
JUSTICE, A.D. 1715—1756.

*Journal of the Rev. Francis Welles, Vicar of Prestbury,  
Gloucestershire, and Justice of the Peace for the County of  
Gloucester, A.D. 1715 to 1756. Fol. MS.*

(Continued from p. 291, Vol. XI.)

WE have elsewhere called attention to the custom of Mr. Welles of keeping all entries of his Petty Sessional doings separate and distinct from those relating to Assize and Quarter Sessional business; a column in every page of his book being dedicated to each department of his office. Of these, as may be readily imagined, the former present but few features of interest. They refer principally to the issuing of orders for the removal of intrusive paupers, warrants and summonses for assaults, the correction of wayward servants, refractory apprentices, and over stern masters; moreover, in these minor records are embalmed the backslidings of many an erring damsel who "had a son for her cradle ere she had a husband for her bed," which are thus freshly remembered upwards of a century after she lived and sinned. Here and there, however, we happen upon materials for speculation and inquiry, and if unimportant it is nevertheless amusing occasionally to trace the downward career of some persevering and impenitent misdoer as shadowed forth in these concise annals of crime.

Thus on the 10th July, 1719, Mr. Welles grants "an order on Tho: Bird of Worcester as putative Father of a Female

Born at Cheltenham of the body of Penelope Wills, Single-woman, to pay 2*s.* a week to Cheltenham till 'tis 12 years old, then 4 *li*: to put it out Apprentice. The mother to pay 6*d.* a week." Two months later a warrant is granted "to take up Penelope Wills for running away from her Bastard." Seven years glide away,<sup>a</sup> but neither the lapse of time nor past experiences suffice to render Penelope Wills a sadder and a wiser woman. Her suitors have metal more yielding and malleable to work upon than those of her namesake the Ithacan dame of old. On the 19th November, 1726, a warrant issues "against Ric: Harmer and Abr: Jewit for giving money to Penel: Wills to swear falsely," and on the 22nd occurs the following entry, "Rich: Harmer of Cheltenham, Bricklayer, ten: in 10*li*: to appear next Sess: for giving money to Penelope Wills to swear falsely concerning the father of her Bastard Child; Abr: Jewit of Cheltenham, Woolcomber, ten: in 10*li*: to appear for the same." Of "Walter Lawrence of Sevenhampton, Gent:" a graceless and turbulent son of Belial, a slight but no doubt characteristic sketch is furnished by two entries in the muster-roll of delinquents, of which he is the subject. On the 18th September, 1718, a warrant is granted to levy 12*s.* upon him, as Mr. Welles indignantly writes, "for swearing and cursing six times in my presence and hearing at Cheltenham," and on the 16th January following R. Finch, of Cheltenham, in his natural anxiety for self-preservation, is constrained to apply for and obtain a warrant against the said Walter Lawrence "for threatening to kill him." On the 4th July, 1720, a warrant is granted "against Wm. and Giles Major, John Richard and Nathaniel Stephens, John Payn and Rich: Jackson of Alstone for riotously assembling, cutting down and carrying away a tree of Mr. Justice Dormer's\* at Arle." Of these rioters, Giles Major afterwards,

\* Of Mr. Justice Dormer's connexion with this part of the country, the following account is given in Sir Robert Atkyns' "History of Gloucestershire," published in 1711:—"Arle Court did anciently belong to the family of Arles from whom it came to the Grevils by the marriage of Robert Grevil, brother to Judge Grevil with the daughter and coheirress of John Arles.

as has already been noticed, underwent the extreme penalty of the law for the murder of Francis George, of Alstone, on the 26th April, 1726.

Once, and once only during the forty years for which Mr. Welles bore the civil sword, he has to record the raising of the howl of witchcraft, that Moloch of the sixteenth and seventeenth centuries when the victims of ignorance and superstition "passed through fire" by thousands. On the 29th March, 1726, a warrant is granted to Mary Williams against Francis Lund, of Winchcomb, and Jane, his wife, "for charging her with witchcraft." In venturing upon this bold mode of refutation the accused seems to have displayed no less courage than wisdom. True, the horrible mania for burning and otherwise maltreating persons whose chief crime in most instances lay in advanced age and an ill-favoured exterior was gradually dying out,—can it be said even yet to be completely extinguished?—but it was not until ten years afterwards that the penal act of James I. against witchcraft and sorcery was blotted from the Statute book which it had so long disgraced. It was thereby enacted "that if any person shall use practise or exercise any conjuration of any wicked or evil spirit, or shall consult, covenant with, or feed any such spirit, the first offence to be imprisonment for a year and standing in the pillory once a quarter; the second offence to be death." Death then, for in such cases right seldom did the quality of mercy intervene, was still the meed of those unfortunates who were convicted of doing the devil's work upon earth, (by the way, it may be interesting to the profession to know that upon one occasion during this period of rampant sorcery Satan found

From the Grevils it came to the Liggons by marriage with the heirs of Grevil, and from the Liggons it came to Sir Fleetwood Dormer by marriage with the heirs of Liggon. Mr. Justice Dormer is the present proprietor who has a seat in this place and a very large estate in the neighbourhood and in Buckinghamshire and other counties. His birth and learning have justly placed him on the bench of the Common Pleas."

There is a brass in the chancel of St. Mary's Church at Cheltenham for William Grevil, above alluded to, who was also one of the Judges of the Common Pleas, and who died in 1512. There are also inscriptions for other members of the Grevil family.

it convenient to appear in the guise of a barrister, as we learn from Wierus, book IV. c. 9,) and it was not until the year 1736 that the advancing intelligence of the country put a final period to the atrocities which had been and might still then be practised under the provisions of a cruel and bloody law. Moreover, at the time when Francis Lund and his wife raised the cry of witchcraft against Mary Williams, there were living those who in their childhood may have shuddered alike at the diabolical cruelties practised by Matthew Hopkins in his capacity of "Witch Finder General" and the nameless deeds of the "black and midnight hags" his victims. Nor, if it then slept, had the law long been dormant. But ten years before, viz. in 1716, a woman and her daughter,—the latter only nine years of age,—were hanged at Huntingdon "for selling their souls to the devil and raising a storm by pulling off their stockings and making a lather of soap." Between the years 1694 and 1701, no less than eleven trials were instituted before Lord Chief Justice Holt for witchcraft, but in all these cases that eminent Judge appealed so successfully to the good sense of the jury that the accused were suffered to escape. In 1711, however, a slight reaction seems to have taken place. In that year Jane Wenham, better known as "The Witch of Walkerne," took her trial before Justice Powell for bewitching two young women named Thorn and Street. The evidence against the unfortunate woman was of the character usual in such cases. She had vomited crooked pins, and had been pricked deeply in the arms without the following of blood. Moreover, one witness deposed to having found "cakes of bewitched feathers" in Thorn's pillow, which seem to have had the effect of keeping that unfortunate young woman in a state of much sleeplessness and discomfort. These "cakes" the witness minutely described. They were "of a circular figure something larger than a crown piece," and it was further observed of them that "the small feathers were placed in a nice and curious order at equal distances from each other, making so many radii of a circle, in the centre of which the quill ends of the feathers

met." The number of feathers in each cake was uniform, being thirty-two, all of which were glued together by a sort of viscous matter which would stretch into threads before breaking; and the interior part was composed of "short hairs, black and grey, matted together," which in the opinion of the witness had been borrowed from the hide of a cat. At this stage of the proceedings the Judge manifested a very natural desire to see one of these enchanted cakes, and equally natural was the wonder he expressed upon learning that they had all been burned; the explanation being that their destruction had been considered necessary to the relief of the bewitched person whose recovery during their existence was hopeless. Another witness had seen a cat whose face he swore most positively was the counterpart of that of Jane Wenham. The prisoner in her defence simply asserted that "she was a clear woman," and the Judge in summing up left it to the Jury to determine whether upon such evidence it were fitting to deprive a human being of life. The Jury after a lengthened deliberation found the prisoner guilty. His Lordship then inquired whether they found her guilty upon the indictment of conversing with the devil in the shape of a cat? to which the foreman, relieved probably by the suggestion from a difficulty in defining the exact grounds upon which he and his brother wisecracks had arrived at their decision, gravely assented. His Lordship then reluctantly passed sentence of death upon the prisoner, but it is comforting to know that by his strenuous exertions a pardon was eventually procured, and the Witch of Walkerne stepped forth from durance a free woman. With these trials, which must have taken place in her own time fresh in her recollection, we cannot withhold our admiration of the courage displayed by Mary Williams in thus attempting to rebut the charge preferred against her, and trust that her attempts at refutation were as successful in protecting her from danger and annoyance as she herself could have wished.

The administration of justice is sometimes accompanied with danger, as the following note of Mr. Welles sufficiently proves,

and which bears date 13th April, 1727:—"A mittimus to commit Rich: Hains for assaulting his wife with a naked Hanger in my presence who came to swear the peace against him, and likewise for assaulting me and others with the said Hanger."

On the 2nd April, 1730, a mittimus is granted "to commit John Shermer for stealing 3 Hats from Edward Deakins of Evesham at Cheltenham New Market: Edw: Deakins of Evesham in the County of Worcester ten: in 10 li: to prosecute and give evidence next Sess:" In like manner as Edward Deakins brought his cargo of hats from Evesham to be disposed of in Cheltenham market even so did Mr. Michael Johnson (father of the renowned Samuel) wend each week from his house in Lichfield to Birmingham to preside at a book stall on the market day.

We now return to that portion of Mr. Welles' Diary which relates to the proceedings at Assizes and Quarter Sessions.

At the Assizes held August 19th, 1732, the entire business seems to have devolved upon Mr. Baron Comyns, Mr. Justice Probyn the other Judge "not sitting." The account rendered us of the Assizes is as follows: "Two men were tryed for murder. Ely Hatton for barbarously murdering Thomas Turberrill of Mitchel Dean, Carpenter, by knocking out his brains with an Ax as he was at work and by many strong circumstances found Guilty. And Thomas Burchel for murdering John Causon. The case was Causon was driving a waggon in the Highway through a field where Burchel had a piece of clover and a slight gate set up cross the Highway to defend it. A boy that went with the waggon and held open the gate let it fall before the waggon was quite through and pulled off the head of the gate. Burchel being told of it galloped after the waggon and with a middling stick which had a pretty large knob at the end, taking the small one in his hand struck him over the head with the knobbed end, and afterwards gave him several blows more: and riding against him with his horse threw him down. They afterwards

engaged and Causon seemed too hard for him and 'twas proved Burchel had his shoulder struck out and several wounds and bruises about the head and neck. Causon went home, being about half a mile off, but quickly afterwards found himself very ill (it being about 5 or 6 in the evening) and in an hour or two lost his senses and died about 11. The Judge laid no stress at all upon the wounds and bruises Burchel received, for he being the aggressor it was without provocation, without cause sufficient to stir a man's passion, 'twas murder. So what was to determine it murder or manslaughter was the breaking the gate. A mans Property was thereby invaded which might put him in a passion. A man was kill'd (of a Press Gang I think) endeavouring to seize a man without shewing his authority: here his liberty was invaded which to an Englishman is as dear as anything. It was judged Manslaughter. So when a child told his father (I think it was) a man had beat him. He followed the man about half a mile and beat him so with a stick that he died. But had he run him through with a sword, the Judge said it might have been otherwise. The Jury brought Burchel in guilty of manslaughter. The Judge offered Mr. Varney who was counsel for the King to let it be argued as a matter of law, but he after a little talk declined it."

The Quarter Sessions held October 3rd, 1732, and January 9th following, offer nothing worthy of observation, nothing beyond a few unimportant settlement cases being recorded.

Of the Assizes held March 3rd, 1732, before Mr. Justice Fortescue Aland and Mr. Baron Thompson, we have the following notice:—"Mr. Baron Thompson gave a very excellent charge: delivered with a very handsome grace and fine natural oratory: without hesitation or a word superfluous. He tryes Prisoners mighty well: and in directing the Jury briefly and plainly sums up the force of the evidence and the Substance of the Prisoners defence without a tedious running over all that every witness says, which, I believe, leaves the Jury no wiser sometimes than they were before. 'Tis a busi-



ness he had been versed in by being Recorder of London. He seems to me a very ingenious and good natured Gentleman. Two were condemned John Turner of Rodborough for stealing cloth and Richard Flackson for stealing a Mare, but both reprieved." Sir William Thompson, the learned Judge thus eulogised, was appointed a Baron of the Exchequer Nov. 27, 1729.

At the Quarter Sessions held April 3rd, 1733, Mr. Hyet Chairman, Mr. Welles observed "nothing material."

The following Assizes were held July 7th, before Mr. Baron Page and Mr. Justice Lee. "Mr. Justice Lee gave a handsome charge. The Gaol was very slender."

Sir William Lee was appointed a Justice of the King's Bench June 13th, 1730, and was afterwards, June 9th, 1737, appointed Chief Justice of the same Court. He became a Baronet on the death of his brother in 1749.

The General Quarter Sessions were appointed to be held July 10th, but clashing with the last mentioned Assizes were adjourned until Thursday, 12th. "There was an odd case of Removal. Cirencester had remov'd a woman Big with a Bastard Child on the Sunday, I think, to Hampton; Monday or Tuesday they found a mistake, it should have been to Linam in the Parish of Hampton: for they have district Officers and maintain their poor distinctly. Thereupon they get their order back again and get Mr. Sandford one of the Justices to alter it, (telling him as he says it was not served,) but in the meantime the Bastard was born. This was heard last Sessions, and to set them right the Court quash'd the Order, because it appeared to be altered after it was signed by the Justices and when one Justice was not present. So a new Order was made sending Mother and Bastard again to Hampton which seemed strange to me when they knew the Mothers settlement to be at Linam. But I found 'twas done because they could not"—Here the writing, which is generally of the clearest kind, becomes indistinct, so that their Worships' "most exquisite reason" may not be told. It appears, how-

ever, to have been unsatisfactory to Mr. Welles, for he thus proceeds: "But I dont understand the Politicks of that, or what Cirencester could get by it. Upon the tryal 'twas adjudged the womans settlement was at Linam, and the Bastards could not be at Hampton where 'twas born: because the mother was *in transitu* or in custody of the Law."

Another case from the same Sessions is also reported, in which Mr. Welles doubts the propriety of the decision of the Bench. "An order of removal from Stanley, I think, to Anson? was tried. The case was the man had taken an Estate (I think of Mr. Jones of Tewkesbury) of about 28 li: per ann: about the beginning April to commence from the Lady day before for 3 years (as I remember) he stocked it with 8 beasts and about 24th or 25th of April had a Plow day and plow'd up the ground that was to be plow'd: in May he came to it, and resident about a fortnight, the 24th of May he left it having agreed with his Landlord to quit the Bargain. As he came the parish insisted upon his being Chappel Warden, and he was sworn in accordingly at the Visitation and received the Briefs, paid for the catching of Sparrows and acted as a Chappel Warden during his continuance in the Parish, and no one is yet sworn in his place. Mr. Cook and four more which were the majority of the Bench adjudged it no settlement. But I am of opinion in the King's Bench it would be adjudged a Settlement upon either of the points."

Nothing deserving of notice appears to have occurred at the Quarter Sessions held October 2nd, Mr. Cook Chairman.

At the Quarter Sessions held January 15th, Mr. Cook Chairman, Mr. Welles observed nothing very material this Sessions, "only," he adds, in a somewhat irate fashion, "Mr. Yeates" (one of the Counsel) "would have made us believe the children's settlement might follow the mothers after the fathers death."

Mr. Justice Reeve was the sole officiating Judge at the Assizes held March 13th, his colleague, Mr. Baron Thompson,

"being sent for back upon account of the Nuptials of the Prince of Orange with the Princess Royal."

"Judge Reeve gave a very good charge, is a very good Judge and seems a very courteous Gentleman.

"Four were condemn'd: Charles Hicks found' guilty on three Indictments for Horse stealing is to be hang'd. The other 3 for Felonies repriev'd for Transportation."

Mr. Justice Reeve was appointed a Justice of the Common Pleas this year, (1733,) and afterwards, January 6th, 1736, became Chief Justice of the same Court and died the following year.

The Quarter Sessions intervening between the above mentioned Assizes and those held July 27th, 1734, offer nothing worthy of notice. The Judges on this occasion were Mr. Justice Fortescue Aland and Mr. Justice Lee. We gather from the charge delivered by the latter of these learned Judges that Turnpikes had achieved unpopularity, long before the time of Rebecca and her followers. His Lordship "could not see but it was High Treason for numbers of people to assemble together to cut down Turnpikes erected by Act of Parliament; as well as to throw up Inclosures pull down Meeting houses &c. which has been declared High Treason. This he spoke upon occasion of the many notorious Riots and cutting down Turnpikes lately practised about this County. 'Twas a small Assize and little business done at either Bar."

At the Quarter Sessions held October 8th following, "Ld. Noel was sworn in order, I suppose, to act as a Justice of the Peace." A question of settlement between Cirencester and a Parish in Oxfordshire is also mentioned.

Mr. Welles did not attend the Quarter Sessions held January 14th. "I did not go to this Sessions it was such extraordinary bad and blustery weather, the waters so high and the ways so very bad."

Mr. Justice Fortescue Aland and Mr. Justice Lee again acted in conjunction at the Assizes held March 8th. "Judge

Fortescue in his charge said Justices of the Peace were formerly chosen as Knights of the Shire are, but in Edward the 3rds time the King got an Act of Parliament to authorise him to appoint them under pretence of the danger that might arise from numbers assembling together in those troublesome times when his father was in prison. I suppose he meant 1 Edw. 3, c. 16, which runs in these words—for the better keeping and maintenance of the Peace the King will that in Every County good men and lawfull which be no maintainers of Evil or Barretors in the Country shall be assign'd to keep the Peace. The like 4th Edw: 3, c. 2. And the Justices oath is 10 Edw: 3, c. 4. And 34 Edw: 3, c. 1 'tis said there shall be assign'd One Lord and with him 3 or 4 of the most worthy in the County with some learned in the Law. And by 18 Hen 6 He must have 20 li: a year: Now £100 li: Twas a large Gaol. 2 condemned: Robert Witherel for Burglary and stealing a flitch of Bacon. There were 4 Indictments more against him for Felonies on which he was not tried: and Ralph Fletcher for cutting cloth off Racks. Fletcher was reprieved: Witherel ordered for execution—since reprieved."

The Quarter Sessions held April 15th, 1735, Mr. Cook Chairman, appear to have afforded no materials for observation.

Mr. Welles appears to have taken no part in the following Sessions held July 15th, "the weather was so bad."

The next Assizes were held August 9th, 1735, before Mr. Baron Page, the other Judge Mr. Justice Probyn not sitting. "There were Seven condemn'd this Assize. But 3 reprieved, Four executed. Edmund Goodrich of Charlton Kings for murdering Robert Gregory going to arrest him by Shooting him in Mr. Cox's Shop at Cheltenham. He was hung in chains but cut down two days after. Nathaniel Willis and John Willis, two brothers for robbery. And Sarah Baylis for murdering two Bastard Children. The Judge would oblige all the High Constables to put in their presentments whether their Highways were in repair or out of repair. For

his Coach it seems broke at Churcham, that he was forc'd to get out and much ado to get along." We fear the infirmities of temper under which Mr. Baron Page is known to have laboured were somewhat severely tested upon this occasion, and trust that the somewhat unusual number of condemnations was in no way traceable to the breaking down of his equipage and its inconvenient consequences, and the absence of his brother Judge, which imposed upon him the entire duties of the Assizes.

The following Quarter Sessions were held October 7th, Mr. Cook Chairman. A case turning upon a settlement by apprenticeship is all that is mentioned upon this occasion.

At the Quarter Sessions held January 13th, Mr. Hyet officiated as Chairman. A point of Sessional practice is the only thing remarked upon. "A man shall not be suffered to try his traverse without giving notice to the Prosecutor: but it being upon a Presentment of the Grand Jury where there is no known Prosecutor it was asked to whom notice must be given? Mr. Yeate said to the foreman of the Grand Jury, and said upon my asking him the Question he had known it done. If it was usual we agreed it should be continued: but thought it a very trifling ceremony when 'tis ten to one whether the foreman knows anything of the matter, the whole Jury always concurring in what any one of them does of that nature."

The following Assizes were held March 13, before Mr. Justice Fortescue Aland and Mr. Baron Fortescue. "Mr. Baron Fortescue gave a very handsome charge deliver'd with great deliberation and natural becoming eloquence. He was made Judge just before the Circuit and seems to be a very modest and courteous gentleman and a very merciful Judge. He tryes Prisoners with a great deal of tenderness and minds them of anything that may be for their defence, that their ignorance or fear may not be to their prejudice. four were condemned but all reprieved."

To the above note is superadded the following: "At

Worcester Assizes April 3rd. Three were condemn'd for cutting down Ledbury Turnpike, one of them reprieved and two, one a Horsestealer executed."

At the Quarter Sessions held May 4th, 1736, Mr. Hyet Chairman, nothing worthy of remark occurred. The following Quarter Sessions were "held by adjournment July 27 from the 13th the Council and Sheriff by reason of the lateness of the term being not come down: Mr. Cook Chairman."

Mr. Justice Comyns and Mr. Justice Probyn were the Judges of the Assizes held August 28, the latter not sitting. (It will be remembered that we have endeavoured in a former article to account for the fact of this learned Judge so repeatedly declining his duties at the Gloucester Assizes.) "This was the longest and most remarkable Assize that I ever knew. It ended not untill Friday about 6 in the evening and probably would have held till 10 or 12 had not Pope and Arcolls tryal been put off for want of Jurymen, but six appearing and the Prosecutor refusing to try it by talesmen, and the Gentlemen too (for twas a Jury of Gentlemen) refused to be joyn'd with them. There were eleven, the Sheriff told me, Special Juries. Some of the causes upon which they were returned went off but six or seven were tryed. Thomas James for returning from Transportation and breaking a House since he returned was condemn'd."

The next Quarter Sessions were held October 5th, Mr. Hyet Chairman. "There was a Settlement try'd which I think had something new in it. A man and his servant differed and the Master, I think, fetched a warrant from Mr. Sandford and had a hearing before him. Mr. Sandford told them since they could not agree the master had best look him another Servant and the man another Master, and fix'd the wages the master was to pay him, and so dismissed them. The master when he came home would not pay him. The man applies to Mr. Sandford again who, I think, writ to him. But the master then told him iff he would go on and serve up his time he would pay him all his wages, which he did.

Whether this was a settlement was the Question. (There was no dispute about the years hiring or Service.) The major part of the Bench was against its being a settlement. For the first contract was dissolved in a legal way by the authority of a Justice of the Peace and could not be cemented again by the parties. But Sir Henry Penrice who was on the Bench and I, and one or two more, were of the other opinion. For though a Justice of the Peace might authoritatively dissolve the first Contract he did not seem much to exert that authority but rather to try to end it amicably between them. And 'twas plain the master did not abide by the determination of the Justice in not paying the man his wages. And there was no second bargain but they agreed to go on and did go on upon the first to the end of his time."

At the Assizes held March 5th the presiding Judges were Mr. Baron Carter and Mr. Baron Fortescue. "I was not there this Assize," writes Mr. Welles, "having lost my dear wife the day before."

The following note of a case which occurred at the Quarter Sessions held April 19th, 1737, Mr. Hyet Chairman. "A woman was removed by a wrong Christian name (by mistake of the Clerk.) She was in Court, prov'd to be the same that was examined and removed. 'Twas long debated about altering it. I did not think they could by the Act for altering matters of Form; for iff anything be Substance surely the name is. But I would have had them alter it by consent and go on to the merits. I did not stay in Court till 'twas ended. But it seems afterwards the Court divided, 5 against 4 for altering it. But soon thought better of it and quashed it for the misnomer."

The following case which occurred at the Quarter Sessions held June 12th, Mr. Cook Chairman, is one which is more than usually characteristic of the very extensive and unscrupulous litigation with respect to pauper settlements which prevailed at the period. "A remarkable order and as remarkable an appeal happened between Coln St. Albans (Alwyns) and

Hyeworth in Wiltshire. Hyeworth had brought a child to Coln St. Albans by an order of Vestry (as they said.) Coln St. Albans apply to two Justices who setting forth the fact remove it back but without any adjudication or taking notice of a settlement. Hyeworth appeals upon the invalidity of the order for want of an adjudication &c. Coln St. Albans replies they never intended it for an order of Settlement but to return the child to them who had unlawfully dropt it in their parish and leave them to find out the settlement, putting the labouring oar where it ought to be. This admitted of a pretty long debate. Mr. Cook was of opinion that if we confirmed the order Hyeworth would be burdened with the child and never legally remove it to Coln St. Albans though they should be able to prove the settlement there. I was of a different opinion because the Settlement was not before us, nor had ever yet been contested, nor any notice taken of it in the order. Accordingly it was confirmed, but we are likely to hear more of it."

The next Assizes were held August 13th before Lord Chief Justice Willes and Mr. Sergt. Skinner, "Judge Comyns being ill." "There was a great deal of business this Assize at both Courts. Eight were condemned four executed, two of them Gypsies for robbing another Gypsie. The great cause between Mr. Bathurst and Mr. Jones about the Island that the River Severn has left was not tried by reason of some defect the Judg found in the Record. 'Twas a special Jury of Gentlemen, but only six appeared but the Judg supply'd that defect by Talesmen, but after opening the cause he espyed the Flaw and opened it to the Council, but declared himself very ready and even desirous to try the cause if they could tell him how it could be done."

Sir John Willes became Chief Justice of the Common Pleas January 28, 1737. He was afterwards a Commissioner of the Great Seal. We find Sir Francis Fust officiating for the first time as Chairman at the Quarter Sessions which were held October 4th. "All our business," says Mr. Welles, "at this



Sessions was to discharge Prisoners upon the Insolvent Act: 19 were discharged, 12, I think, continued. It lasted until Thursday though we had not one appeal and little of anything else."

Mr. Hyet officiated as Chairman of the Quarter Sessions held January 10th. "I was not at this Sessions," writes Mr. Welles, "the weather was so very bad."

Mr. Justice Fortescue Aland and Mr. Justice Chappel were the Judges of the Assizes held March 4th. "Mr. Justice Chappel (a new Judge) gave a good charge, and seems a very courteous Gentleman. Four persons were condemn'd, 3 for Housebreaking and 1 for Horse stealing, 2 of those for Housebreaking were executed."

The Quarter Sessions held April 11th, 1738, Mr. Cook Chairman, afforded no materials for observation.

Mr. Hyet was Chairman of the Quarter Sessions held July 11th, 1738: "I was not at this Sessions the Bishops Visitation being the same day, and the wet weather discouraged me from going as I had intended in the evening. But I hear one very remarkable case from thence, that they reversed the order for removing John Greenway and his wife from Cheltenham to St. Catherines in Gloucester, though it was proved his Fathers Settlement was there and he had gained no settlement himself; for what reason I can't imagine: I think they say because he had never lived there. Contrary to all I ever heard or read. And to what has been laid down as a maxim and confirmed by the Judges, That the Sons Settlement shall eternally follow the fathers till he gains one of his own: being till then *pars patris*."

The Assizes August 5th were held before Mr. Baron Page and Mr. Justice Denton. "It was a large Gaol. Four were condemn'd, three executed. Henry Arwin and Nath: Web, for robbing on the Highway and John Ovens for Horse stealing. Wm. Morgan condemn'd for robbing on the Highway was reprieved."

No notice whatever is taken of the Quarter Sessions held

October 3rd beyond the fact that Mr. Cook officiated as Chairman.

At the Quarter Sessions held January 9th Mr. Hayward was Chairman. "Mr. Hayward gave an excellent, honest, English Charge. We had but few appeals and nothing new or very remarkable in them. But a pretty deal of Gaol business; six were ordered for transportation. Mr. Baghott Delabere tells me a pretty remarkable case which was tryed after I went out of Court. A man was Indicted for Felony in stealing Tythe Corn. It was very fully proved, he says upon him that after the piece was Tythed he came (I think in the night) and lifted up the tops of the cocks and taking away the bottoms set them down again, and so through the whole piece. It was argued it seems by Council, Mr. Stephens and Mr. Yate, as a point of Law whether this were a Felony or not. As far as I can learn what was chiefly insisted on was that the corn never was in the mans possession who claimed it and indicted the thief. But the Council would not give their opinion upon it and the Court seeming a little doubtful about it he was acquitted. But I want to be satisfied in two or three points. If the corn was tythed according to Law whose property was the Tyth? Whether iff the owner of the Tyth had left it there to the prejudice of the owner of the Ground an action would not have lain against him? Whether a man that should have so taken away any of the other nine parts would not have been guilty of Felony?"

The Judges of the Assizes held March 31, 1739, were Mr. Justice Fortescue and Mr. Justice Probyn, who as usual did not appear at Gloucester. Being "out of order with a cold," Mr. Welles was not present.

The Summer Quarter Sessions were held July 24th, having been adjourned from the 10th. Of the proceedings upon this occasion we have amongst others the following note, which it is impossible to read without fully indorsing Mr. Welles' observations on the gross injustice and hardship of the case. "Another case was tryed, very remarkable, I think, and very new. A

man took a House at Berkly: he was to give either 20 li: for a life or 4 li: a year Rent. He liv'd in it 12 years, paid the Poor Rates in his own right: But the Parish would not put his name in the Book. He refused paying. They distrained more than once. He insisted upon his being rated. They still refused; but sent the Rate in the name of one that had been dead 20 years ago (calling it late Gregory's,) and now remove the man. The Parish to which he was remov'd Appeals. I think all the Bench agreed here was a most flagrant piece of injustice and oppression: that a man should be forced to bear the burden (paying the taxes) and not have the privilege of that burden to gain a settlement. However some thought it would not be a Settlement, particularly Mr. Gardner was very positive: the Act requiring a rating as well as paying: and it being an explanatory Act must strictly be construed. However they were for having the opinion of the Kings Bench and so confirming the order specially. I was for having their opinion likewise but for having the order discharg'd specially that the labouring oar might be put where I thought in all reason and justice it ought to be. 'Twas my opinion he was rated sufficiently according to the Act, which does not say, I think, his name shall be put down, and if it does not either he was rated, or one in the grave 20 years, or nobody. After a great deal of talk the Majority of the Bench joyned with me and we got the order discharg'd specially. So now Berkly may try the Kings Bench if they please, and I should be glad if they would: though Mr. Gardner offered me two to one they would be against us, but I have a better opinion."

The Summer Assizes this year were held August 4th, before Mr. Justice Fortescue Aland and Mr. Baron Thompson. "Mr. Baron Thompson gave a very good charge as he always does: took notice of itinerant preachers and the danger of gathering such multitudes together: said he would not Judge of their designs nor examine their doctrines which did not belong to him, but iff they pretended to higher flights than others they should shew their zeal in a Legal way, that the

government might have no cause of jealousy. He gave a great character to the Ministers of the Church of England both those in a Higher and lower Station: (Lord grant we may deserve it.) He tried prisoners with his wonted Candour and tenderness, never giving any of them a hard name or a hard word, how bad soever they appear'd to have been: but still helped them to all the advantage that could possibly be taken to make their defence. It was a maiden Assize."

It would seem from the latter observation that, in the days when Mr. Baron Thompson administered the law, a Maiden Assize was constituted by the fact that no criminal was left for execution.

The next Quarter Sessions were held October 2nd, Mr. Hayward Chairman. "We had," says Mr. Welles, "very little business. I think not a Settlement tried, or not of any consequence, but such as went off with just opening, and dropped or ended by agreement. But a prodigious appearance of Lords and most of the topping gentlemen of the County in order to make an interest against the next election for Knights of the Shire tho' not expected till May come twelvemonth." Truly our ancestors commenced canvassing betimes.

At the Quarter Sessions held January 15th Mr. Cook was Chairman. Mr. Welles, however, did not attend, "'twas so extremely cold and windy."

The Spring Assizes were held March 29th, 1740, before Mr. Justice Fortescue and Mr. Justice Wright. "'Twas a great Gaol of Criminals. Five were condemn'd. Two for robbing on the Highway the other three reprieved."

The following Quarter Sessions were held April 15th, 1740, Mr. Hayward Chairman. "Mr. Hayward gave an excellent honest true English charge: but how 'twas relish'd by some of his right hand brethren I can't tell."

"We had a great deal of business this Sessions. About 16 appeals, they said. One between Winchcomb and Lechampton the strangest judgment I thought given upon it that ever I heard. A man was hired for a year (from Michaelmas to

Michaelmas:) about Whitsuntide he went away: was away about a week, when he came back: his master would not receive him without going before a Justice of the Peace, but a neighbour being by persuaded him rather by a new agreement to bind him to a better and come to a fresh bargain, whereby he was to abate (a crown they thought) of the wages agreed upon at first: and the master gave him earnest upon it. This was fully proved by master and servant, and yet by the majority of the Bench judged (chiefly by Mr. Cook) a continuation of the Service. Tho 'twas short of a year by a week, and the first bargain intirely dissolved by agreement."

It would seem upon this occasion that the indignation of Mr. Welles consequent upon the above objectionable decision was somewhat mollified by his success in mitigating an evil for the correction of which he had long been anxious. "This Sessions being brought into a Strait by an irregular order that they know not what to do with, after a long debate I prevail'd with them which I never could do before to come to a resolution to quash orders for want of Form. I always thought it the unreasonablest thing in the world (and hardly just in us) to send our Country (at five times the charge at least) up to the Kings Bench to do what 'twas by all acknowledged we had a power to do. Therefore upon all occasions as long as I have sate on the Bench I have pressed it, and could never get any other answer than that we never do it: it has never been the Custom of this Court. It is now altered I hope much for the better."

Mr. Welles was not present at the Quarter Sessions held July 15th. He mentions, however, that Mr. Cook officiated as Chairman.

The Judges of the Assizes held July 19th, 1740, were Mr. Justice Page and Mr. Justice Fortescue Aland. "Mr. Justice Fortescue Aland gave as he always does an excellent charge. Upon the head of religion he say'd denying a God or his Providence was Blasphemy at the Common Law: and that there were too many pratical Atheists everywhere, but

whether there were any speculative Atheists he would not say. He thought the being of a God as demonstrable as any Proposition in Euclid and that it has been as clearly demonstrated, and expressed his concern that more notice was not taken of the Publick attacks that were made upon religion in Print, but vile Scoffers were suffered to go on with impunity."

Unquestionably there was ample foundation for these strictures from the Judgment-seat. There are few periods perhaps in English History when "flexible ethics" were more in vogue than during the reigns of George I. and George II., and no doubt the following sketch of the shortcomings of the clergy, and the licentiousness of the press during that epoch, is in its main features pretty correct. "Attendance on public readings of the Scripture being therefore omitted on the slightest excuse, or without any, increasing numbers grew up in utter ignorance of the word and will of God; and the more so from the sadly general neglect of the duty of visiting their Parishioners from house to house, a duty which was irksome to Clergymen who wished rather to have leisure for farming, for field sports or for dinner parties, began soon after mid-day and often ending in an evening at cards. As for those who thought to be their own teachers and judge for themselves, their dangers were increased and the minds of many of them were poisoned by reading the works of Anthony Collins, of Matthew Tindal, of Woolston, Toland, or other deistical writers, who acquired an unhappy notoriety by the audacity, or the sophistry with which they disputed the authority of Gods word." From the same source we have the following observations upon another class of authors:—

"This historian (Smollett) was himself one of the active corruptors of the age which he condemns; making for himself a name and obtaining the chief part of his livelihood, as did Fielding and others, their contemporaries, but of less note, by writing novels, a species of composition hitherto rare, but to which their wit and misused talents gave popularity, and in which they taught their readers to take an interest in the

fortunes of men whom they represented as rising by wickedness to riches and reputation, whilst they treated the affectation of virtue as the only offence that ought to be counted odious, and continually employed blasphemous profanations of the name of the Most High to give point to a jest." The author from whom we quote is wroth, even with the costume of the period. Speaking of the state of art in England during these reigns, he tells us "the only sculptor of eminence was Roubiliac, a foreigner who had come over as to a market in which he should find no competitor. And he showed his taste in this, that he never attempted to represent any English gentleman or lady in the costume of their time and country; for very few civilised nations ever went beyond the English of George the first's and second's days in the utter departure from all gracefulness which they displayed in their dress. If it were not for the specimens of their wigs still to be seen in the portraits of authors prefixed to their published works, though the painter has often preferred representing his employer in his night cap, their posterity would find it difficult to imagine the uncouth covering, sometimes of horsehair, very commonly of matted flax for which every Englishman then parted with his natural hair as soon as he arrived at mans estate."

Of the Quarter Sessions held October 13th we have no note beyond the fact that Mr. Hayward was Chairman; and it further appears that Mr. Welles absented himself from the following Sessions held January 13th. "I was not at this Sessions," he says, "the coldness of the weather frightened me." He nevertheless gives us *ex relatione* Mr. Stephens, a short account of a settlement case argued upon this occasion which it would be superfluous to transfer to our pages.

Nor was Mr. Welles in attendance at the Assizes held March 7th, held before Mr. Justice Fortescue and Mr. Justice Wright. "I was not," he writes, "at this Assize. There was a very bad distemper in the Gaol which frightened me, Mr. Baghott Delabere and many others from going, and made the

Judges use all precaution by washing and smoaking the Hall, and setting the prisoners in a remote place, and but one or two at a time to prevent any danger or infection. There were no less than 85 prisoners in the Calendar. Five continued from last Assize and 80 committed since: Six of whom died in the Gaol."

Nothing of importance seems to have occurred at the Quarter Sessions held April 7th, 1741. There were "a great many appeals this Sessions," which fact is attributed to "the scarcity of work everywhere and the dearness of all sorts of provisions" —which seems to have given rise to many removals of paupers and consequent appeals.

The Summer Assizes of this year were held before Mr. Justice Chappel and Mr. Baron Reynolda. "One person was condemn'd for robbing his Uncle (I think) on the Highway, and likewise tryed for Murdering him, but that was not sufficiently proved. 3 persons, 2 women and a man were found guilty of stealing lambs, but the Judge respited the sentence being not satisfied whether they were in the late Act against Sheepstealers." The doubts expressed by the learned Judge upon this occasion appear to have found a place in the breasts of later Judges. In the cases of *R. v. Loom*, 1 Moody C. C. 160, and *R. v. Birkett*, 4 C. & P. 216, when the prisoner was indicted for stealing sheep and the stolen property proved to be lambs, it was held that the indictment was not supported by the evidence. But in the more recent case of *Reg. v. M'Cully*, 2 Moody C. C. 34, an indictment for killing a sheep with intent to steal the carcase was held to be supported by proof of killing a ram or ewe, the majority of the Judges considering "sheep" a generic term comprehending all members of the family without regard to age or sex.

The above-mentioned Assizes appear to have clashed with the Quarter Sessions, the latter consequently were adjourned until the 16th of the same month. There were many appeals to be disposed of, but none calling for remark.

Mr. Hayward was Chairman of the following Sessions,



October 6th. "Our Chairman," says Mr. Welles, "was the day before chose Mayor of Gloucester, and always gives very good charges, only delivers them a little too fast. Mr. Palmer was this Sessions unanimously appointed one of the Chaplins to the Castle."

Upon the occasion of the Quarter Sessions held January 12, Mr. Welles is absent. "I did not go to this Sessions the weather being bad, the way watery and the days short."

Mr. Justice Parker and Mr. Justice Wright were the Judges of the Assizes held March 13th. "There was a Great Gaol of Prisoners for capital crimes. William Seymour was indicted for murdering his brother Berkly Seymour and found guilty. It being all to be picked out by a train of circumstances the tryal lasted from between 7 and 8 in the morning till 2 in the afternoon. 'Twas a very sensible Jury. And the Judge (Wright) left it intirely to them: telling them they were Judges of the Fact, and barely repeated the evidence to them without so much as letting them know to which side his judgment led him, but they were but a little while before they brought in their Verdict, and he and the whole Court, I think, were perfectly satisfied in it: ten were condemn'd. Six executed, one within the city liberties which, I think, they say, has not happened before these 37 years, and they observe that the son of him that was Sheriff for the City then, was Sheriff now. Seymour was executed; and denied the Fact they say to the last: which I am sorry for."

Sir Thomas Parker became Baron of the Exchequer July 27th, 1738. He was afterwards appointed one of the Justices of the Common Pleas, and returned to the Court of Exchequer in 1742, as Chief Baron.

Sir Martin Wright was appointed Baron of the Exchequer November 5, 1739. He was subsequently removed to the King's Bench *vice* Probyn November 24, 1740, and resigned in 1755.

At the Quarter Sessions held April 27th, 1742, Mr. Cook Chairman, the Bench appear to have got into a difficulty of

which together with the solution the following account is supplied:—"We had a pretty deal of business and about 18 or 20 Justices" (in those days a numerous Bench.) "The Bench upon one point being equally divided they seemed at a loss what to do: which I wondered at. I told them I had known it often. And it seemed very obvious to reason that when the Court did nothing in it the order of the Justices appealed from must stand good. Some seemed to think that the Chairmans side must carry it. But I told them that was a compliment I thought it not in our power to pay him. At last, I think, one that had declined came into our side and so the matter ended."

Mr. Cook was Chairman of the Quarter Sessions held July 13th. None of the proceedings are recorded.

The Summer Assizes for this year were held before Barons Reynolds and Abney. "Mr. Baron Abney delivered a good extemporary charge with a very strong voice. He took notice particularly of mobs and Riots and the dangers of them but especially of Libels which never grew to such a height as now. There was a pretty large Gaol: near 40 prisoners in the Calendar. Four condemned and three executed."

Sir Thomas Abney became Baron of the Exchequer Nov. 27, 1740, and was afterwards, Feb. 10th, 1743, appointed to the Common Pleas.

Sir James Reynolds was appointed a Baron of the Exchequer June 12, 1740.

Nothing worthy of notice appears to have taken place at the Quarter Sessions held respectively October 5th and January 11th. The following note, however, is subjoined. "The Judges of the B. R. I hear have agreed that no Justice shall sign an order of removal from any place where he has an estate. But by what law or for what reason, or what notice we shall take of it I can't tell. For my part I shall take none."

The Spring Assizes following were held on March 5th, before Mr. Justice Dennison and Mr. Serjeant Birch. "Mr. Serjeant Birch gave a good extempore Charge: 'twas a pretty

large Assize. Six were condemned: Two executed: Joseph Mutloe Hang'd in Chains on Rodborough Hill for murder. And John Waters for robbing on the Highway."

There was "little to do and not one Appeal" at the Quarter Sessions held April 12th, 1743. At the following Sessions held July 12th, Mr. Welles was not present, there being "about 30 hours' rain from Sunday midnight to Tuesday morning."

The Summer Assizes for this year were held July 16th, before Barons Carter and Clark. "I was not at this Assize the weather and ways being bad."

Mr. Baron Clark was appointed Baron of the Exchequer Feb. 11, 1743.

From these until the following Assizes there is nothing worthy of mention.

Mr. Justice Dennison and Mr. Serjeant Birch were the Judges of the Spring Assizes held March 3rd. "There was a full Gaol and a great deal of business. Thomas Cambray and John Curtis for breaking and robbing the house of James Millington by Cirencester and killing his wife, and Andrew Burnett and Henry Payne for robbing and murdering Sir Robert Canns Coachman were all condemn'd to be hang'd in Chains. But Curtis died in Gaol."

The Quarter Sessions following were held on April 3rd, 1744, Sir Francis Fust Chairman. "Snow wind and rain were so bad that few gentlemen appeared," and amongst the absentees was Mr. Welles.

The Summer Assizes were held before Mr. Justice Wright and Mr. Baron Abney of the strong voice. "It was a very small Assize they say as has been known. Few criminals and but for small offences. I was not at it designing to go to Sessions the Thursday following."

Mr. Welles was accordingly present at the next Sessions, when he says "There was a great appearance of Justices, 20 upon the Bench the first evening." (It would seem from this and other passages to be met withal in Mr. Welles' remi-

niscences, that the business of Sessions usually commenced after dinner.) There appears, however, to have been but little business for this unusually strong Bench to transact.

The Quarter Sessions following were held October 2nd, Mr. Hayward Chairman. Mr. Welles was again absent, "it being bad weather and dirty roads."

Nothing from this date until the Quarter Sessions held October 8th, 1745, is observable. Upon that occasion we are told "It was a great Session for the number of Noble men and Gentlemen that appeared. My Lord Berkly and Ld. Ducey were there and dined with us. I then entered my Qualification."

It will be remembered that this year saw the last venture of the House of Stuart for the English Crown. No reference whatever is made to it by Mr. Welles.

It has been for some time past manifest that revolving years are slowly but surely doing their work and that the powers of the stout old Magistrate are fast failing him. Eighty years of his life have now passed away, and it is upwards of thirty since he first took the civil sword in hand—let no man say in vain. The handwriting once so firm and vigorous, and, where space requires it, almost microscopic, in which his experiences are recorded, now becomes irregular and faltering; his pen seems to stagger from very weakness. From this time forth he appears but once, namely on the occasion of the Summer Assizes of 1746, at his post at the "Booth Hall." But still like a staunch old hound who rouses him when the music of the chase in which he can no longer join is heard afar, he still continues to take a lively interest in the duties which through so many years have occupied his time and attention. He still furnishes as regularly as ever, for nearly ten years more, the dates of the respective Assizes and Quarter Sessions together with the names of the presiding Judges and Chairmen, but there is something akin to the pathetic in the few simple words which invariably follow, "I was not present." Now and then, however, he manages to pick up, from friends or other sources,

some stray grains of information of what is passing upon these occasions, which he duly records. For instance, he mentions upon one occasion (in the same year, 1746,) that a new Act having passed against profane cursing and swearing the Bench ordered the substance of it to be published in the "Gloucester Journal" and declaring their resolution "vigorously to execute it." And moreover he gives a contemporaneous note of the well-known slow poisoning case of *Rex v. Blandy*, in the following words,—“At Oxford they tryed and condemn'd Anne Blandy for the horrid crime of Poisoning her own father Mr. Blandy, town Clark of Henly on Thames.” He also observes a change in the order in which the Judges took the different Circuit towns upon this occasion. “From Oxford they went to Worcester; thence to Gloucester; which I never knew before.” The Judges of these Assizes (Spring, 1752,) appear to have been Barons Legge and Smythe.

The last appearance of the handwriting of Mr. Welles, now almost illegible, occurs in a notice of the Assizes held July 11th, in the same year before Mr. Justice Foster and Mr. Baron Clive. But the end is not yet. For the few remaining years of his life he avails himself of an amanuensis, who in a round schoolboy hand informs us amongst other things that at the Assizes held August 17th, 1754, before Lord Chief Justice Willes and Mr. Baron Clive, “There was a new Commission of the Peace in which my son Thomas Welles and it is said about Fifty more were put in.” On January 24th, 1755, he seems to have executed his office for the last time. The next and sole remaining entry in the volume to which he so sedulously devoted himself for so many years runs thus in the handwriting of his son: “My Father the Reverend Mr. Fran: Welles died May 30th, 1756, aged about 90, having been above 40 years an acting Justice of the Peace.” Peace be with him!

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## ART. VIII.—THE LAW OF NATIONS.

*The Law of Nations considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace.* By TRAVERS TWISS, D.C.L., Regius Professor of Civil Law in the University of Oxford, and one of Her Majesty's Counsel. Oxford: University Press. London: Longman, Green, Longman, and Roberts. 1861. Pp. 378.

THOMAS AQUINAS, at the commencement of his treatise on theology,\* has laid down the position that a branch of study may be entitled to the rank of a science, even though its data do not rest upon intuitive, or internal, evidence. Music, which is the example cited as in point by that eminent metaphysician, is not, perhaps, the best calculated to support this thesis. The proposition itself, however, is irrefragable, or, rather, there can be no distinction in kind between postulates as such. Even the pure sciences are based upon certain facts which form no part of our intuitive perceptions. Every science must be inductive, to a certain extent, according to the number of its premises. The pure sciences, indeed, require so inconsiderable a number of inductions, compared with those which are at the basis of the more complicated branches of physical or of social knowledge, that these are properly termed mixed sciences, as distinguished from the former, which are essentially deductive. Physics and social science, at the same time, have not been detruded from the category of the sciences, even though the numerous data of those studies rest almost entirely upon evidences that are external and complicated. The fewer premises, however, of a non-intuitive character which any branch of study involves, the more nearly does it approach to the rank of a pure science, so as to admit of a deductive

\* Prima Pars Summæ Theologicæ. Titulus II.

development and, consequently, as it were, of a natural growth and progress. It follows that the degree in which an author shall contribute to the advancement of a mixed science, such as Jurisprudence, or any of its various branches, will very much depend upon the extent to which his investigations can partake of an *à priori* character.

The work of induction in most departments of the mixed sciences is, at the present day, complete. Deduction, and not induction, as Mr. John Stuart Mill correctly observes, is the work especially allotted to the scientific portion of the present generation. Mr. Mill's theoretical error, as to the type of reasoning, is deprived of much of its practical demerits by this observation, inasmuch as the follower of Mill will also endeavour to follow, at least in practice, the ratiocinative method prescribed by Whately. Not only, indeed, is induction not so necessary to be inculcated now as it was in the days of Bacon, but, on the contrary, so complete and redundant is our information in most departments of the mixed sciences, that the analyst is often obliged to exercise an eclectic scrutiny, and eliminate from his review many collections of facts, which might impede, rather than facilitate, his inquiries. In the science of political economy, for instance, treaties of commerce not only afford no insight into the true principles of trade and government, but, as a general rule, they have been rather the reverse of those principles. Political treaties, however, cannot be disregarded by a jurist, however high his *à priori* notions may be, to the same extent as they may be by an economist, because, although some treaties may possess but few claims to be perpetuated, nevertheless, all treaties taken together form a large portion of the conventional or customary branches of the law of nations, which are equally as binding as the elements which that code has derived from the natural or moral law. This single example may suffice to show that the inductive method has greater claims upon the international jurist than it can, at the present day, have upon the inquirer in any other branch

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of the mixed sciences. This is owing to the numerous facts which are at the foundation of most international laws. It is equally clear, however, that a conventional law has not the same expansiveness as a natural law, in respect to the juristical solution of new emergencies. The positive compacts and customs of the past can afford but slender grounds for ulterior speculation, except so far as they coincide with the first principles of the natural law. A series of historic events does not always admit of a philosophic, much less of a scientific collocation. It is very unlikely that Mr. Buckle's attempt to impart a scientific character to the details of English history will be successful. Every branch of study departs from the scientific standard in proportion as it is *avide des faits*. That this is the main character of international law it is unnecessary formally to prove. The inductive method, therefore, is doubtless the one more especially appropriate for the analysis and classification of international laws, most of which are mere generalized facts or statements of usage. Induction, accordingly, has been very properly selected as the determining guide of our author in his compilation of the present treatise. Whether nations should not strive to impart a more scientific character to the international code by embodying in it more precepts of the natural law than it comprises at present, is a different question. The existing code is based mainly upon usage and convention—upon facts rather than upon principles. The grouping of correlative facts, rather than the excogitation of laws, is, therefore, the proper business of the international jurist. Such an historical treatment of the subject, however, will not deprive (as Aquinas has observed, in general, as to similar sciences,) the treatise so constructed of scientific authority, although, indeed, such a method will, *ex necessitate rei*, confine within very moderate bounds the range both of discursive and deductive suggestion.

The author informs us, in the preface, that the object of the present treatise has been to present “a systematic outline of the leading principles which are at the foundation” of inter-



national law, "and, at the same time, to illustrate the application of those principles as occasion served, by reference to the practice of nations in the conduct of their mutual intercourse."\* This method of treating of the science of international law is eminently adapted to meet the requirements of theory as well as of practice. When the general principle is first stated by an author, no matter whether its own evidence rests on *à priori* or *à posteriori* data, it may equally facilitate the comprehension of the details grouped under it, while, if it aims at a generalization of rules, it paves the way for further progress in the same path. Our author's method does not, however, strictly coincide with the scheme he thus proposed to himself. His work, in point of generalization, amounts to little more than a compendious statement of international events; it proceeds upon a basis of historical fact, the peace of Westphalia being selected as the point of departure. The treaties of Munster and Osnabruck pointed out to him that period as a good limit to his explorations *a parte ante*, as these treaties were "the first practical recognition," (to use the author's words,) "on the part of the nations of Europe of the principle of territorial sovereignty," and supplied "a groundwork for an European concert to uphold that principle."†

The author considers that the connexion between the independence, as distinguished from the sovereignty, of princes and the possession of territory had not been observed until the idea of the imperial supremacy had ceased to influence juristical speculations. Huberus‡ accounts in a similar manner for the silence of the Roman civil law upon questions of international right. We consider, however, that these views are more specious than sound. The sphere of the authority of states has been from the earliest times defined by the extent of their territorial possessions. Sallust, in the 79th chapter of the Jugurthine War, has recounted an interesting contest regarding national boundaries between the inhabitants of Carthage and of Cyrene. Can it be for a moment con-

\* Preface, iii.

† Id. iv.

‡ Lib. 1, tit. xii. p. 24.

tended that the colonization of America was not based upon the principle that empire was acquired by the parent state over the territory colonized? "The right of empire," Dr. Twiss himself observes, in a subsequent portion of his treatise, "accompanies the right of property in the case of international possessions."\* It is obvious that these conflicting statements cannot be reconciled. We can only express our surprise that metaphysical contemplation can have induced a writer on international jurisprudence in any manner to deny the antiquity of a law of nations which has existed from the beginning, and to substitute instead thereof refined disquisitions upon the distinction between sovereignty and independence. Indeed, an absurdity appears to be involved in the proposition that the territorial limits of a nation, or independent state, can at any time have defined only the sphere of its sovereignty or supremacy over its own subjects, without having equally defined the sphere of its independence (if it enjoyed such,) of foreign nations. The view taken by an author, however, may, if he so choose, be more analytical than complete. It was accordingly reserved for Mr. Austin, as stated by us ante, Vol. XI., p. 244, to comprehend in his survey the negative as well as the positive elements of nationality—the independence as well as the sovereignty of nations.

"Sovereign states," Dr. Twiss observes,† "are not necessarily nations, while states internationally independent are not always sovereign powers." This distinction is, no doubt, sound in theory; in other words, sovereignty and independence denote different phases of statehood, the former term being commonly used in reference to the administration of the internal, the latter to that of the external, affairs of a state. In point of fact, however, the *double* distinction rests on an insufficient foundation. There is no perfectly independent state on the face of the globe that is not also sovereign. Indeed, that species of foreign control or suze-

\* P. 196.

† P. 23.

rainty which would leave the dependent state full liberty to enter into treaties with foreign nations would appear to be destitute of all real value to its possessor, unless the suzerainty involved a right to a fixed periodical tribute. Such a feudatory payment, however, implies no greater restriction upon the sovereignty than it does upon the independence of the tributary state. The countries which are commonly supposed, and are alleged by Dr. Twiss,\* to be sovereign and not independent, and, on the other hand, those which are considered by him to be independent, but not sovereign, do not, in point of fact, correspond respectively with the parts of this description. The North American States, for instance, which Dr. Twiss considers to be sovereign, but not independent, are not really sovereign, even as regards their judicial systems, as these are subordinate to the Supreme Court. These states have been commonly considered and termed sovereign, mainly on the supposition that they had, notwithstanding the constitution of 1787, implicitly reserved to themselves a right to re-assert at any time their independence or their sovereignty, independently of the federal government. On the other hand, the Barbary States, which are considered by Dr. Twiss to be independent, but not sovereign, enjoy as great a degree of sovereignty as they do of independence. These states are hereditary regencies, and pay a tribute to the Porte. But this tribute does not appear to have compromised the sovereignty of those states more than it has their independence. They have the power, however, of entering into treaties—which, indeed, the Padischah has always professedly ignored—and are consequently nations. It is the right to form treaties with foreign states, and not complete sovereignty or complete independence, that constitutes the essential characteristic of a nation. The right to form treaties is, however, as a general rule, (for the payment of tribute does not appear to disturb either the general sovereign or the international rights of the

\* P. 23.

tributary state,) enjoyed only by those states which possess both complete independence and complete sovereignty. The independence of a state may, indeed, be abolished without affecting its sovereignty, but we know of no state that is only semi-sovereign, and is, at the same time, completely independent. The passage we have cited from the treatise before us would therefore appear to admit of the modification that sovereign states are almost invariably nations, but that independent nations are necessarily, at the same time, sovereign states. The connexion between independence and sovereignty, it thus appears, is more intimate than the partial analyses of international jurists sometimes seem to admit.

The author does not give any definition of the term law, but seems disposed to approve of the views of the scholastic jurists, who were the immediate predecessors of Grotius, and to consider the term as primarily denoting "an ordinance of reason promulgated for the common good."[\*] He distinctly objects to the notion of law as "a rule of conduct imposed by a sovereign power upon a subject community." It is hardly necessary for us to observe that it is neither in its moral nor in its utilitarian aspect that a law should be contemplated by the jurist. The moral merits or demerits of a law belong to the science of political ethics; its expediency or inutility to that of general politics. Any given law is to be examined by the jurist in the light merely of a command, which, in respect to its subject matter, prescribes a general course of conduct, and of which the observance is enforced by adequate physical sanctions. Publication and sanction are the only elements of a rule of conduct indispensable to constitute it a law. Any definitions of the term, therefore, that aim at an analysis of moral feelings are beside the question; so also are those which mainly regard the general utility of laws. The Navigation Laws were, doubtless, entitled to the designation of laws, although they violated the first principles of utility and of

\* Preface, vi.

free trade, which is now so generally recognised as the innate code of humanity and civilization. Laws in restraint of freedom of religious worship violate the moral conditions to which all positive rules ought to conform. Nevertheless, penal enactments in restraint of religious liberty have never yet been denied to be laws. The immorality or inutility of a law may ultimately lead to its repeal or abrogation; but so long as it remains in force, it should be regarded only as the voice of the executive. If any other view of law be taken by the jurist as a primary subject of his analysis, it is likely to lead to confusion of thought on his part, and to involve him in irrelevant speculations. As regards the metaphysical question, whether our notion of law is to be formed with especial reference either to reason, conscience, or the will, we may observe, merely with a view to the refutation of the opinion propounded by Dr. Twiss upon this point, that international laws should be considered mainly in the light of positive precepts only. The ordinances themselves do not always comprise, or even readily suggest, their ethical or utilitarian qualities, of which, consequently, a knowledge can, as a general rule, be obtained only by ulterior deduction and experience.

The reasons assigned by Dr. Twiss for his preference of the views of the pre-Grotian scholiasts to those of Bentham's school, are the superiority of the reason to the will, and also the fact that, according to the definition of law adopted by the latter class of jurists, there is "no such thing as a law of nations; for independent political communities, from their nature as such, do not acknowledge any common superior."\* The first reason involves that reference to ethical views and considerations which we have already deprecated. The second reason wants foundation, in fact. Nations do recognise, and are subject to a common superior. That superior is the federative executive, which wields the balance of power. No nation can outrage the feelings of humanity to such an extent as to

\* Preface, vi.

endanger the stability of all social principles and a regard for national honour, without soon, like the Benjamites, suffering the vengeance of their fellows. But, lest the voice of natural law might not excite nations promptly enough to resist the ambitious efforts of any individual state, the system of an approximate balance of power has been suggested by obvious necessity as a necessary positive institution against the unjust territorial aggrandizement of states, which is the species of international injustice that is most likely to be of frequent occurrence. If international laws were not administered by a competent executive, the treatise before us should be classed with the productions of ethical authors, but would have no place amongst works on Jurisprudence. Indeed, if there were no adequate sanction of international law, there would be no necessity for a publication of those laws, nor, consequently, for any formal treatise on the positive precepts of the international code. Breaches of international law sometimes pass unpunished, but offences against the municipal code not unfrequently likewise meet with impunity. The obligation and penal nature of many of the rules of international law are placed in a clear light by means of the penumbra of imperfect rights, which are admitted to be incidental to the more fundamental rules, but are not as rigidly enforced as the latter. The right of legation, for instance, is sometimes denied by a particular nation to another; but such a refusal is not supposed to constitute a *casus belli*. The seizing of the territory of a neighbour is, on the other hand, confessedly a breach of the law of nations, which may be justly redressed by means of war.

Dr. Twiss presently afterwards admits that the balance of power constitutes the physical sanction of international law,\* and this position, indeed, is one of the leading characteristics of his treatise. He states, however, that the principle of this sanction is "the right of war *purum piumque duellum*." This

\* Preface, p. viii.

proposition is almost unmeaning. The principle of the system of balance might, we think, be more properly sought for in the utility of that institution rather than in *à priori* or moral considerations, although, doubtless, the advantages of the system constitute, when recognised, a claim upon our conscience. It is the utility of the system which indicates an obligation on the part of sovereign states in respect to it. Conscience cannot be supposed capable of suggesting devices suited to the complicated mechanism of international society. Besides, not only is the right of war a distinct thing from the balance of power, but even such a right may be merged in the paramount obligation of maintaining the international executive in its integrity. For instance, the union of two large empires, by reason of the descent of their respective crowns upon a single head, has, in itself, nothing immoral or inexpedient. The sole heir would in such a case have a right to go to war, if necessary, to enforce his claim to the succession to both crowns. His allies, however, would have a paramount right to frustrate such a design; and, if he had himself previously recognised the system of balance, his right to reign in both kingdoms became merged in the more comprehensive obligation of allegiance to the Amphictyon of nations. To regard, therefore, the right of war as the principle of applying the system of balance, as Dr. Twiss does, appears to us, so far as we can attach a meaning to the statement, to be not only an error, but to be the very contradictory of the fact. This confusion of ideas on the part of Dr. Twiss results from his having entered upon ethical considerations, which the very method of his treatise, proceeding mainly, as it does, upon chronological, as distinguished from logical data, might have shown him to be inappropriate.

Mr. Austin considers "that the law of nations obtaining between nations is not positive law, for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author."\* He further adds, that "the law

\* Austin on Jurisprudence, p. 208.

obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions, by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility and incurring its probable evils, in case they shall violate maxims generally received and respected." Dr. Twiss, in the fifth chapter of the present treatise, when commenting upon these views of Mr. Austin, with a view to refuting them, abandons, with more judgment than consistency, the position maintained by him in the preface, with respect to the nature of laws. He briefly, but clearly, shows\* that rules of conduct which are enforced by physical sanctions are rules of law, as distinguished from rules of morality. We may add, that the assumption that first occurs in the passage we have cited from Mr. Austin's work is entirely unfounded. Every positive law is not "set by a given sovereign to a person or persons in a state of subjection to its author." The monarch may be subject to almost the whole of the civil code of the realm, but he cannot be subject to himself. Moreover, international law is not set by general opinion, and enforced only by moral sanctions, unless the fear of physical and other material injuries be, contrary to all received usage, designated a merely moral sanction. The international code has the distinguishing criteria of a law, being enforced by the enactment of penalties, while its publication is to be found both in the decisions of Courts of Admiralty as also in express treaties.

The science of the law of nations is formally defined by the author to be "the science of the rules which govern the international life of states."† This definition is somewhat imperfect in point of logical distinctness. It is too wide, as it comprises relations of international morality, as well as relations of law—imperfect as well as perfect rights. Dr. Twiss, however, correctly distinguishes between nations and states, terms which Vattel has treated as synonymous. Our author

\* P. 151.

† P. 2.



limits the application of the term nation to those states which enjoy international life; that is, which are competent to enter into compacts with foreign nations. According to this principle of classification, the American States, the States forming the Helvetic Confederation, and the Christian States of the Ottoman Empire, are not nations; while the States constituting the Germanic Confederation possess each the characteristic of international life. It is, says Dr. Twiss, in "the capacity of a people to fulfil the obligations of natural society towards other peoples without the consent of any political superior, that we discover the true characteristic of international life."\* He elsewhere observes: "The term nation, politically considered, signifies a society of persons occupying a common territory, and united under a common government—in other words, a commonwealth or state."† Again, he describes a nation in terms that appear intended by him to constitute a formal definition of the word. "A nation," he states, "is, in fact, a political body, capable of discharging, without the consent of any political superior, the obligations of natural society towards other political bodies, and of regulating, in concert with them, the mode of discharging those obligations, either as regards the mutual action of the communities themselves, or as concerning the intercourse of individuals of them."‡ This diffuse and inelegant definition rests on an indefinite and incomplete hypothesis. The author had already denied the character of a moral person to a state when he said, that § "the classification of a state under the head of Moral Person, for the purpose of assimilating its rights and duties to those of a natural person involves a metaphysical conception of the being of a state. Puffendorf's definition," our author proceeds, "will accordingly allow no assistance in an inquiry, in which the real or constituent elements of a state are the subject of investigation. We are altogether at a loss to discern how, if the latter passages enunciate sound teaching, a nation can be the subject

\* P. 5.

† P. 1.

‡ P. 9.

§ P. 4.

natural law. The natural law, indeed, meant by Dr. Twiss, is, as he afterwards explains it, the law\* "founded on the nature of independent states as such." But this objective origin of natural law, besides being wholly opposed to the received meaning of the phrase, natural law, is, moreover, useless for any practical or juridical purpose, if moral qualities are denied to be attributable to a nation or to its conduct. The definition is thus very ambiguous, both as regards the sources and the characteristics of the natural law of nations. It is, moreover, obviously inadequate, for a nation is bound to obey the conventional, as well as the natural, elements of the international code.

A nation may, we think, be defined to be a body politic, which is competent to contract, or maintain, relations with foreign Powers. Any body politic thus generally empowered to enter at its own discretion into treaties with foreign states is a nation, and any body politic or state which wants this power is not a nation. It will be found, on examination, that states which want this power have merged their nationality in that of the government, which prohibits them from exercising this political function. Cicero's conception and definition of *populus* as "*Cætus multitudinis juris consensu et utilitatis communione sociatus*,"† by no means corresponds with our notion of a state. The general silence of Roman jurisprudence as to international affairs accounts for the great orator and philosopher confining his analysis of the elements of a "Respublica" to its internal organization. For the Roman there was no world outside Rome's walls. The Roman jurisconsult would admit that foreign states might have rights derived either from natural law or from treaty; but he did not inquire into the nature of such rights until the barbarians became actual litigants before the Prætor Peregrinus, who then decided *pro re nata*. Grotius, who lived at a period when the natural equality of nations was better understood in point of

\* P. 111.

† "De Republica," l. i. c. 25.

theory, as it was better exemplified in fact, than in the days of Cicero, has thus defined a state: "*Est autem civitas cætus perfectus liberorum hominum juris fruendi et communis utilitatis causâ sociatus.*"\* The substitution of the expression "*liberorum hominum*" for "*multitudinis*," it is probable, was suggested by the consideration of the external relations of states, which Grotius had proposed to himself as the exclusive objects of his analysis, and in which, of course, only free men could interfere. The independence of states is also, in some measure, suggested by the substituted expression. Dr. Twiss considers that the Grotian definition implies the freedom of the individual man in a natural state. This view may, indeed, be suggested by the substituted phrase, but cannot, without overstraining the passage, be assumed to be implied in it, especially as the consideration of the rights of individuals, as such, formed no part of the scheme of Grotius. Vattel's description of nations as sovereign states, which are to be considered as so many free persons living together in a state of nature, places the independence of nations in a clear light. A nation may doubtless be regarded as endued with an understanding and a will, and its acts capable of being designated as conformable to, or violating, the dictates of reason and morality. The Roman civilians regarded the republic as a person, (*persona*,) and, in such, the subject of rights. But, as the moral sense of individuals is called on to deal only with a few actions in daily life, the more complicated avocations being capable of being determined as to their moral qualities only upon careful calculation of their consequences, so, *à fortiori*, can only a few of the simple acts of international life be judged of, as either right or wrong directly in themselves, and without regard to their effects. The criteria of morality, however, *ex post facto*, enable us to regard a nation as a subject not only of law but of right and moral sentiments.

Besides the objective origin of the natural law of nations

\* De Jure Belli et Pacis, l. i. c. 1, § 14.

derived from a consideration of their natural independence, Dr. Twiss has suggested another foundation as appropriate to this law. He considers, with Vattel, that individuals have surrendered to their respective states their rights as regards one another, only so far as the organization of each state renders necessary, and that, consequently, the mutual obligations of persons, that are respectively subjects of different states, remain otherwise unimpaired. It is from this position that both Vattel and Dr. Twiss infer that the supreme power in a state is under an obligation to observe the laws of nature in its dealings with foreign states. This subjection of the head of the state to the law of nature, as regards international transactions, is to be attributed, we think, not so much to the moral personality of the individual members of which the whole body politic is composed, as it is to the analogy which the independent governments with which it is brought into contact bear to individuals, as regards law, right, and duty.

In respect to the personality of nations, the author observes, that "international society is thus, in its elementary condition, the most enlarged phase of natural society, wherein men hold intercourse with one another; not individually and immediately, as in civil society, but collectively, and by representation, the body of men, of which a political community consists, holding intercourse with other like bodies of men through the medium of the state, the internal organization of which is immaterial, provided it represents the civil society for all international purposes."\* Although this passage indicates more fluency than elegance of style, nevertheless, the views expressed by it are, as far as they go, sufficiently correct. But, besides the international intercourse of states, the subjects of these also meet each other in various characters, the mutual relations of which are equally regulated by the law of nations. Dr. Twiss, however, did not propose to himself to treat at any

\* P. 8.

considerable length of private international law. He, therefore, has but briefly discussed, in the fourth chapter, the relations of the conflict of civil laws to public international law.

The author sometimes appears inclined to attribute a purely *à priori*, as distinguished from an inductive, basis to the natural law of nations. "The primary or absolute laws of nations," he observes, in the commencement of the sixth chapter,\* "rest upon a foundation of moral truth, 'the proofs of which are to be referred to some such certain notions,' to use the language of Grotius, 'as none can deny without doing violence to his own judgment.' The secondary or conditional rights rest upon a basis of historical fact." In other words, the law of nations is derived partly from the moral or natural law, and is partly the result of usage. A treatise upon international law should, therefore, be both analytical and inductive. As, however, the positive elements of international law have been developed upon the basis of the natural law, all the data of the science are consequently united together by so many common features of resemblance as to render all the rules of the international code susceptible, in some measure, of a deductive development. It is in this respect that the treatise before us is mainly deficient. We seldom find any attempt in it to expand a rule beyond the precise facts which originally led to its establishment.

A state *de jure* independent of all other states, is *ex vi termini* sovereign over its own members, and stands on an equal footing with foreign nations, its peers. It is a *bifrons Janus*, and presents a perfect development of sovereignty in a twofold phase—as regards its subjects and as regards its peers. It is thus like a *paterfamilias*, who is master of his own household, but can claim only an equality of rights as regards the heads of neighbouring houses. This analogy between an independent sovereign state and a person *sui juris* suggests

\* P. 143.

several important considerations regarding the right of intervention, which Dr. Twiss has passed over almost *sicco pede*, although that right has been of late years one of the main difficulties of European statesmen. The right of intervention is scarcely noticed in the treatise before us, except to be denied. The right or duty to prevent intervention is not mentioned by Dr. Twiss. The latter right should, doubtless, have been fully discussed by an author claiming to enunciate and classify all the general principles of international law with a view to their use in the solution of practical difficulties. The custom, or right, of embassy implies the existence of an abstract imperfect right of surveillance. If the analogy of civil life were allowed to affect the international rule, it would tend to establish not so much the right of surveillance or espionage, as that of direct intervention, if public or international morality were grossly and publicly outraged by a particular state. Intestine commotions confessedly do not afford a justifiable ground for intervention, neither does even a Chinese exclusiveness, although such appears to be contrary to the comity of nations, as it is certainly contrary to the law of nature, which, by means of a diversity of clime and products, as well as by the occurrence of famines and other similar wants, endeavours to enforce a communion amongst all nations. But though the prevalence of internal seditions, or of an exclusive social or political system, is not considered to afford sufficient ground for intervention, yet, cases might be readily stated, even in respect to sedition and exclusiveness, in which the international rule would be subjected to a severe ordeal. The maxim *silent inter arma leges* is, alas! one that has often received a ready and wide application in practice; nor, whenever a nation wishes to attack another, is the former likely to be long in want of a *casus belli*. Nevertheless, although pretexts for war are not long subsequent to the desire, still, international law and its different phases have their respective functions. The province of Government, as well as that of Jurisprudence, has been clearly determined, so far as is necessary for

all practical purposes, as regards the sovereignty or international supremacy of a state: the limits of external interference are doubtless, capable of being as distinctly defined.

The writer carefully distinguishes those states which are incorporated together *jure imperii*, under a common sovereign prince, from those states which are federally united together *jure societatis*. We have no objection to the enumeration of every possible variety of confederation, and the assigning to each federate state a place in its proper category, if it be borne in mind that such varieties of internal organization do not directly come within the range of public law, unless the states so united together possess distinct international systems. If a state possesses a national individuality, its integrity is not impaired by the fact that its supreme head likewise administers either by accident or compact, the executive power of other states. Any other test, except that of the possession of a distinct international system, that is used for determining the right of a state to a place in the enumeration of nations, will be found delusive, and productive of confusion in the analysis to which it is applied. It is unnecessary for the international jurist to designate federate unions as personal or real, temporary or permanent—these qualities of states being outside the province of public law. How unsubstantial, viewed without reference to the established test of nationality, is the distinction of federations into real and personal, may be inferred from the fact that Wheaton and Phillimore consider the union of Sweden and Norway as personal only, just as Hanover was personally united to Great Britain, or as Neufchâtel is at present united to Prussia; while, on the other hand, Klüber\* and Heffter† designate the union of Norway and Sweden as real. If the simple and obvious test of nationality which we have just mentioned be applied to the solution of any like disputed question, the answer will, in its relations to international law, be

\* § 27.

† § 26.

free from all ambiguity. Norway has no distinct international system. It is, consequently, not a nation, and cannot be the subject either of a real or of a personal union. Hanover, on the contrary, while united to the British Crown, did not cease to have a distinct international system. It, therefore, continued during that period to be a nation, and its union with Great Britain may be correctly termed personal. Dr. Twiss\* denies the union of Sweden and Norway to be either real or personal; still, he seems inclined to consider that this union has an international significance. It has none. As Norway has not any international existence of its own, it certainly cannot be the subject of international relations more than Kent, Wales, or Ireland can. Varieties of internal or of federal organizations are important subjects for the inquiries of the political philosopher, but they have no direct connexion with the law of nations. This law regards international systems alone, and without any respect to the mode in which the executive power is administered, whether it is deposited in the hands of one, many, or few, or whether it represents the political strength of a single state, or of many. The term personal, however, is usually applied to denote accidental unions, such as subsisted between Great Britain and Hanover in the interval between the years 1714 and 1837; while unions of a permanent nature, such as subsists between the Crown of Hungary and the imperial House of Austria, are usually denominated real. Dr. Twiss proposes to alter this nomenclature. He considers all such unions to be personal, but he would subdivide them into temporary and permanent unions; while he would limit the denomination of real unions to states, which, like some of the component members of the Germanic Confederation, enjoy both a separate and a common international system. We consider this departure from established terminology to be unnecessary. The Germanic States, which form parts of a *Gesammstaat*, do not virtually possess either a double inter-

\* P. 52.



national system, or a double international existence. Such an international duality, if it were actually enjoyed by these states, would enable them to multiply their international influence upon public law and policy. But the Germanic Confederation does not maintain resident ambassadors at foreign courts, simply because the states constituting that confederation do not accredit such envoys. One of these states cannot vote in one manner at the Diet and act differently in its separate relations with foreign Powers. This follows from the nature of the thing; and it is also in substance provided for by the eleventh article of the Federal Act. The Germanic Confederation is consequently, nothing more than a permanent league. It is indeed, necessary that its state-system should be explained in treatises on public law; but it is equally necessary, in order to prevent confusion of thought upon this subject, that the international jurist should show that the states which form it possess rather an alternative, than a double, nationality. If they act in a particular manner in the Diet, they cannot act otherwise out of the Diet. But they may separately, if they so choose, exercise international functions out of the Diet. This confederation of states is not a better example of a real union, in the impracticable sense attached to that term by Dr. Twiss, than is the union between Hungary and the Germanic States of the House of Hapsburg-Lorraine; since the former states, so far as they act in concert, cease to have any real separate nationalities, or any discretion in respect to the affairs administered by the Diet.

"The true characteristic," says Dr. Twiss, "of a personal union seems to have been pointed out by Grotius, when he says, that upon the extinction of the reigning house the empire reverts separately to each people. He might have added, continues our author, "that a like separation of the kingdom would ensue, if the succession to the respective crowns should diverge to different members of the reigning house." This is a good generalized account of what has actually happened, in respect of personal unions; and it also goes to the substance

of the matter. A tacit agreement by two or more states, that their executive is to be administered by *the same person*, appears to be the sum and substance of a personal union. The test given by Grotius and developed by Dr. Twiss is, nevertheless, afterwards repudiated by him. The union of the Ionian Islands with Great Britain, Dr. Twiss observes,\* “is purely *personal*.” But this union is altogether unconnected with the course of the succession to the British Crown. The author omits inquiring whether the sovereignty of each of the American States was merged in that of the Federal Government by the constitution of 1787, such an examination being, as he very pertinently observes, without the scope of a treatise on the law of nations. But, as to the independence of those states, he plainly expresses himself as of opinion that it was by means of the constitution mentioned merged in the nationality of the union. The soundness of this opinion cannot, we think, be impugned; for none of these states can, without the consent of Congress, lay a duty on tonnage, or enter into any agreement even with another state of the union; while even the judicial systems of the several states find a common *embouchure* in the supreme court. The right of any of these states to secede from the union is another matter, and is a question that belongs to the province of general jurisprudence, but it is not directly connected with that of international law. Dr. Twiss contrasts the origin of the Argentine Confederation, which resulted from the decentralization of a single state, with the formation of the American Union, which was the product of the union of many states into one. We may observe, in respect of the analysis which Dr. Twiss has given of this and of similar confederations, that, as the actual internal organization of a nation has no international significance, *à fortiori*, an historical account of the primary elements out of which a nationality has been developed cannot be used to elucidate any question of international law. The third chapter

\* P. 35.

of this treatise, which gives a detailed account of the nation-state-systems of Christendom, appears to us to be unnecessarily prolix, if not irrelevant, in a treatise which professedly relates only to the external relations of states. The succeeding chapter, on the Ottoman Empire, is almost equally tedious. The varied and peculiar relations of that power to the general public law of Europe deserved, no doubt, a special notice. The Ottoman Empire was not considered to be a member of the European Amphictyon, except as far as the express stipulations of treaties provided, until it was declared by the seventh article of the Paris Manifesto of 1856, that the Sublime Porte was "admitted to a participation in the advantages of the public law of Europe, and the system of concert attached to it." The first portion of this chapter is appropriate enough in describing the peculiarities of the foreign relations of the Turkish Empire, but, as if the necessity for an entry upon that exclusive region justified an indefinite sojourn there, the author gives us a most insipid narrative of treaties relating to the various provinces of that empire. These two chapters cover sixty-five pages, and contain no elements which could directly come within the province of the law of nations; they could not either be wholly omitted, or at least described in a single page, without at all interfering with the scientific integrity of the treatise. Such minutiae in a work on international jurisprudence are almost as inappropriate as if a writer of political geography had his treatise interspersed with accounts of the geological conformation of different countries.

The fifth chapter of this work, which treats of the sources of the law of nations, resumes the scientific analysis of the subject which was somewhat interrupted by the voluminous details contained in the two preceding chapters. Dr. Twiss approves the terms of the division of international law adopted by most of his predecessors, and considers with them that the sources of the law are twofold—"natural or necessary law, and positive or instituted law."\* Our author, however, attaches a peculiar

\* P. 111.

sense to the phrase natural law, in reference to nations. He does not mean by it what the civilians meant by the *jus gentium*, when they defined it to mean that code *quod naturalis ratio inter omnes homines constituit*.\* The natural branch of international law has not, according to the more formal positions maintained by Dr. Twiss, an *à priori* origin, but consists merely of certain objective truths, or generalized facts. "The natural law of nations," he observes, "is founded on the nature of independent states as such, and is the result of the relations observed to exist in nature between nations as independent communities."† As Rousseau's juristical speculations were concerned with a state of nature, rather than with laws of nature, so Dr. Twiss contemplates, not so much the natural elements of the international law, as he does the natural state of nations. He uses the phrase natural law to denote the necessary incidents of independence rather than any body of principles of right. This view of natural law is very different from the meaning attached to that phrase by most writers on this branch of Jurisprudence. Both meanings of natural law are, indeed, opposed to the sense of positive or conventional law, being both derived from the contemplation of nature. There is this great difference, however, between the received sense of natural law and the meaning given to the phrase by Dr. Twiss, that the conception of natural law is, in the former case, derived from the understanding itself; in the latter, from the contemplation of external nature in its development of distinct nationalities. Although the historical method is, no doubt, the course which should be mainly pursued by the international jurist, who wishes to construct something better than a historical or philosophic romance, nevertheless, natural law, or what has been considered to be natural law, should not be wholly overlooked by him. Whatever views may be entertained as to the first origin of the more general laws of Jurisprudence, it is certain that those laws have been, in their complete development, assumed as natural and binding laws in

\* Inst. l. 1, tit. xl.

† P. 111.

international transactions. Title by occupancy, for instance to newly-discovered territory is an undeniable maxim of the international code. Whether this and similar international laws had their antitype in civil society or not, they have been assumed by Grotius and his school as undeniable maxims of natural law, and have been engrafted by them upon the international code. It is, therefore, now too late, as it is also unnecessary, to inquire whether any maxims of international jurisprudence have really had a genuine natural origin in civil society. *Communis error facit jus*. The wild olives supposed to be the original of the horticultural species, are perhaps, not easily identified; but the latter have been always considered, however erroneously, to have had their antitype in uncultivated nature. They have been always denominated and classified with reference to their supposed wild origin, and it is now too late to alter the nomenclature. Furthermore, international law comprises various precepts not derived from a contemplation of independent nations, but assumed to be deducible from the early condition of civil society, and to have been the origin and foundation of the independence of nations. The application of rules of natural law, as understood by the author, to the elucidation of the law of nations, thus appears to involve a *petitio principii*, or, at least, to leave an important fact, the independence of nations, unaccounted for. He assumes the independence of nations, and, as a consequence, all the incidents of such independence—that is almost the whole of the existing international code—before he proceeds to apply his notions of natural law to the elucidation of international phenomena. There is, however, no element of the international code which we should be more disposed to consider as derived immediately from natural reason than the mutual independence of nations. The necessity that exists for treating of the natural law of nations, therefore, cannot be evaded by the use of the phrase, natural law, in a new and limited sense only.

Having used the phrase, natural law of nations, in a peculiar

sense, Dr. Twiss gives an equally novel account of the sanction attached to the precepts of this branch of the international code. "The sanction of the natural law of nations," he states, "is found in the fact that its violation terminates the existence of an independent state, as such."\* As the author has not given an example or illustration of such a case of international suicide, we are left somewhat in the dark as to the real meaning of this passage, whether it describes a breach of natural law or the sanction of that law. Can Dr. Twiss mean that, if a first-class power wantonly absorbed a weaker neighbour, or committed any other like breach of the confessedly natural branch of the international code, such unjust State should thereupon cease to exist as a nation? If the view adumbrated in this passage be, that a nation, upon assigning its independence to another, thereupon becomes denationalized, we may observe, in respect to such a proposition, that it is a mere statement of a fact, and not of a law or its sanction, and that such a union is not necessarily a breach of the law of nations on the part of either state. If the sanction referred to in the quotation we have cited be merely a moral one, the meaning of the author becomes somewhat intelligible. Allusions to moral sanctions, however, are without the province of international law. If a nation be oppressed, or be sought to be absorbed by another, the duty of the former State to resist the encroachment is only an imperfect duty; such also is the character of the duties imposed upon the federative executive. Indeed, if the latter refuses to aid an oppressed state, it cannot be compelled to do so, as there is no other power sufficiently strong to enforce the observance of such, or of any, obligations on the part of the Amphictyon of nations. But, although such duties on the part of an oppressed state, its allies, or of the federative executive, are imperfect only, and so are unlike those of a civil executive, their correlative rights, on the other hand, are perfect, and constitute, in the case of the supposed aggression, a *perfect* title to prevent and redress the injustice.

\* P. 111.

Hobbes, Puffendorf, and Barbeyrae have denied that the natural law of nations is capable of being distinguished from the natural law of individuals, so as to constitute a distinct science. This appears to us to be a self-evident proposition, for the natural law of nations, so far as it is really founded upon our natural perception of right and wrong, or upon the nature of things, must be analogous to our moral judgments of the conduct of individuals, so far as the circumstances in which these are placed will admit of a comparison being instituted between them and nations. Dr. Twiss, however, endeavours to show that there is an essential distinction between the civil status of an individual who is a dependent member of a political society and the international status of a nation which is an independent political society. If this assertion were correct in point of fact, it would overthrow all claims of any portion of the law of nations to be determined upon principles of natural right, such as govern the relations of civil life. But the assumption is unwarranted, for a nation is independent of all others only as to its internal organization, just as a *paterfamilias* or master is allowed to exercise a certain control over his family or apprentices; but a nation is not an independent member of the general Amphictyon nor free from the control of the aggregate of the other states. It is, in short, a subject of law, just as an individual is the subject of law; and the international code has been unquestionably built up with a close regard to natural law. There is, consequently, no distinct science of the law of nations: it is a branch of general Jurisprudence. But this connexion in principle with other departments of law does not divest it of scientific relations; on the contrary, it shows the universality of its rules and the consequently scientific character of its system. It is not indispensable that a branch of study be regarded as a distinct science, in order to render it progressive, interesting, or scientific. There are no peculiar principles of gravitation appropriated to the sphere of astronomy; yet the scientific nature of that study has not been questioned. If any principles of

law that have been always observed by nations in their dealings with one another are found to resemble in their nature the moral foundations upon which civil codes have been in a great measure constructed, the diversity of subject-matter to which such principles are applied can occasion no essential alteration in the principles themselves. As far forth as international law is a science, it may be illustrated, explained, suggested by, or even derived from, facts, but it cannot be proved by them. The English school of international jurists has always, indeed, as is noticed by Dr. Twiss,\* devoted their chief attention to the practical phases of the science. This, however, was owing to the fact that our jurists did not enter upon the study from a pure love of theorizing, but had their minds constantly directed to the decisions of the Prize Courts of the greatest maritime power.

Far the greater portion of international law depends for its authority upon usage, and not upon natural law or first principles. Thus, a sentence of condemnation passed before the tribunal of an ally, upon a vessel lying in a neutral port, is void by the custom of nations, although it would be difficult to show the incongruity of such a sentence with first principles. (Vide the *Henrich and Maria*, 4 Robinson's Reports, p. 54.) But, although most of the international code is consuetudinary in point of authority, it is, nevertheless, necessary for the philosophic jurist to observe throughout his review a close regard to first principles, both because these alone can be applied to the solution of new cases, as also because they were not overlooked by Governments in their adoption of positive customs. Title by occupancy, for instance, is, as already observed by us, an unquestioned rule of international law, although some of the most eminent jurists of the present day deny that it ever had any influence upon the genesis of civil society. First principles, moreover, may prohibit the extension or liberal interpretation of an existing custom; but a

\* P. 120.



custom cannot, on the other hand, be deemed to possess a supreme authority, except as regards international acts that have no moral significance. A technical adhesion to customary laws might be productive of great confusion of international rights. What maxim sounds more specious than that the cargo should follow the bottom? It seems to be a necessary correlative of the maxim that the flag shall cover the cargo. The former proposition has also had a large amount of usage in its favour. But when we are cautious in accepting usages as data for ulterior deduction, and reason mainly from first principles, as far as these avail us, and the reason of the thing, we proceed without danger of confusion of ideas, or of ignoring established rights. Reasoning from usage is reasoning from particular facts. These must be recognised in every complete system of international law as applicable to individual cases coming under them, but they do not afford any expansiveness for the solution of any other difficulties in practice, or any helps to further progress, in the deductive analysis of international law. Accordingly it has happened that, although the Ottoman Empire was not until recently deemed subject to the European international code, as regards almost all the positive precepts and institutions of that system, nevertheless, that power has always been considered to be bound by the first principles of the natural elements of the law of nations. Not only, therefore, were the piratical enterprises of the Barbary States always reprobated and punished by the rest of Europe, but even as to breaches of a blockade, no indulgence has been shown to Mahometan merchants, even though these conceive, as Lord Stowell said in another case, "as some people have foolishly imagined, that there is no other law of nations but that which is derived from positive compact and convention." (*The Hurtig Hane*, 3 Robinson's Reports, p. 325.)

Martens and Klüber are justly considered by Mr. Reddie \* to have ascribed too much importance to treaties, as sources of

\* Reddie, "Inquiries in International Law," pp. 157, 339.

general international law. Ortolan, and Wheaton in the earlier editions of his work, likewise considered that a series of treaties, or even that a single treaty, in certain circumstances, might impose an obligation on the contracting parties to observe the rule prescribed by the treaty in their dealings with other powers not parties to the compact. Dr. Twiss \* very succinctly refutes this untenable position, and shows, that, as international obligations are reciprocal, it would follow, from the reasoning of Ortolan and Wheaton, that other nations should be bound by treaties to which they were not parties. The American States refused to sign the Paris Declaration of 1856, as regarded the right of privateering, unless the liberal principle embodied in the manifesto were still further extended to the protection of the commerce of belligerents. Yet no one has alleged that the States were bound by the manifesto against their will. International compacts bear a close analogy to civil contracts. It is not necessary that a treaty should state all the considerations upon which it is founded, more than that a deed, constituting the essential evidence of a civil contract, should enumerate all, or any, of the considerations which moved the parties to it. This analogy may be further pursued:—If a deed want a consideration, the instrument is, nevertheless, operative; but if the consideration be immoral, or vicious in point of public policy, the deed is void. So, also, a treaty between states may be founded upon many considerations; or it may be entered into gratuitously by either or both of the parties. But, if the consideration involve a breach of allegiance to the European Amphictyon, it should be deemed to vitiate the contract, even as regards the parties to it. However these analogies may be considered, it is, at all events, certain that nothing short of an express declaration by a nation that it waives, as regards the whole world, the common law of nations in respect to particular specified cases, can bind such nation to observe the stipulations of a particular

\* P. 133.

treaty relating to such cases, except as regards the parties with whom it has so contracted. A series of treaties may, indeed, place the contracting parties under an imperfect obligation to observe towards all other states the rule stipulated for in such treaties; but, as duties of imperfect obligation are not enforced by the sanctions of municipal codes, so neither are they enforced by the international executive. Such duties, consequently, are not within the range either of civil or of international law. The error upon which we have just commented shows the danger incident to all reasoning from particular facts or usages, to the establishment of general laws. If the induction is complete, the general proposition may then be safely enunciated. But the important inquiry frequently remains, whether the induction is sufficiently copious.

The author divides national rights into two classes, primary and secondary, in the former of which he places the right of self-preservation together with the derivative right of self-defence. He considers that this right may justify a nation to resort to immediate hostility against any other nation whose armaments are excessive, and which has refused "to furnish an explanation when it has been asked for in a courteous tone." \* This rule, if, indeed, it have more than a mere notional existence, appears to be a very mischievous one, and to be calculated never to leave an aggressive state without an excuse for the invasion of the territory of another. It is the tale of the wolf and the lamb, couched in a juridical formula; it is also opposed to some of the first principles of international law. For, if the rule of non-intervention is founded upon perfect and well established rights, upon what ground can a foreign nation inquire concerning armaments which may possibly have been prepared by the suspected state in order to strengthen its internal executive? An overt act of hostility should be deemed to be an indispensable condition to justify a similar act on the part of the nation which may be apprehensive

\* P. 145.

of aggression. Prior to its being attacked, it would appear to be entitled to arm to any extent; but it certainly cannot be considered to be entitled as of right, as distinct from courtesy, to demand an explanation of the conduct of an independent neighbour, which has not invaded the territory of the inquiring, or of any other, state. A great development of the military spirit, such as was displayed in France in the times subsequent to the outbreak of the revolution, cannot justify actual hostilities on the part of foreign nations. Even were this development of military ardour a source of power, which it is not, it, nevertheless, would not afford to other states a just *casus belli*. Internal developments, of any kind whatsoever, are outside the boundaries of international law. Even territorial aggrandizement, if the inhabitants of the ceded territory consent, is lawful. But it appears to us, that the process of taking the votes of the inhabitants of the ceded district should be conducted under the scrutiny of the leading states, to render the vote of cession binding upon these Powers. An absolute prohibition of the consolidation of states cannot be contemplated by any international compact, for the principle of such a restriction would apply to confederations and special offensive treaties. If, however, a nation once violates the perfect rights of another state in any degree, however inconsiderable, foreign nations are then perfectly justified, not only in having the injury redressed, but also in persevering in hostilities until the offender shall have given ample security for his future good behaviour, either by a permanent limitation of his armaments or by such other guarantees as the international Amphictyon may consider sufficient.

The question whether, if a state voluntarily consented to be incorporated with another, the other Powers would be justified in forcibly preventing the amalgamation if contrary to the interests of the balance of power, is not likely ever to arise in its complete integrity. No nation ever dreams of surrendering its nationality to a stranger state. The converse case is much more likely. Decentralization is more easily

effected, and is more in accordance with the political feelings of local parties than the consolidation of many states into one. Whenever this is attempted some element for its complete legality is sure to be wanting—either votes are forged, or coerced, or purchased. If a state, however, really wished to be consolidated with another, foreign Powers would not, in point of morality, be justified in preventing the union, even though the interests of the balance of power should seem to require such a prohibition. The rule of international law, indeed, appears to be in favour of the legitimation of such intervention. But, as positive precepts can never neutralize the obligation of a natural law, it would appear that, in such a case, (which, however, conditioned as we have stated, is never likely to occur,) a war undertaken for the sole purpose of securing the interests of the balance of power would be unjustifiable.

With respect to acquisitions by conquest, Dr. Twiss observes,\* “Title by conquest resolves itself juridically into title by cession; and it is not the superior power of the conqueror which gives right to his conquest, but it is the consent of the conquered, which ultimately sanctions the conqueror’s right of possession.” The legal sanction here alluded to would, we think, be more appropriately referred to the acquiescence of other states; for, as regards the conquered state, its acquiescence or consent is of no avail to confer a legal title, since that consent is given under duress.

The author distinguishes the right of empire from the right of property, as regards air, flowing water, the sea, and the seashore. These, says Dr. Twiss,† “are not susceptible of detention, and, consequently, cannot be physically reduced into possession, so as to give rise to that permanent relation which is implied in the juridical notion of property.” This is, certainly, not the reason why only a qualified right of property can be acquired in these things. Air is bought and sold, whenever houses that enjoy a good site in respect of air and

\* P. 192.

† P. 196.

light are bought and sold. (*Vide* Senior's "Treatise on Political Economy;" title "Wealth.") On the other hand, no bulky chattel is capable of being physically possessed or conveyed by manual delivery. A right of property is not measured by the capacity of its subject to be physically or exclusively possessed, but only by the power which the claimant can exercise over the thing. This power may be full and complete without being exclusive. The true reason why only a qualified or temporary property is allowed to any nation in air, &c., is, that the law, or usage, of nations, as founded on the Inst. l. ii. tit. 1, § 1, and not the nature of things, forbids it. The passage referred to in the Institutes bases the community of property in these things upon natural law. But the natural law meant denotes certain rules of conduct, not the physical constitution of those things themselves. The usage of nations likewise forbids that any particular nation should claim a complete right over the same. Dr. Twiss, in the tenth chapter, which treats of the "Right of the Sea," observes, that \* "the ocean or open sea is by nature incapable of being reduced into the possession of a nation, since no permanent settlement can be formed upon its ever-changing surface; neither is it capable of being brought under the empire of a nation, as no armed fleet can effectively occupy it in its full extent, so as to preclude other nations altogether from the use of it. He who considers that only a qualified property can be obtained over the sea, &c., must also hold, as a consequence of this view, that only a qualified right of empire can be exercised over the same. The alleged foundation of both opinions, however, is, as we have shown, insufficient to sustain them. The true and only reason why only a qualified property and empire can be had over those things is, because the law of nations has so ordained. *Ita lex scripta est.*

As regards the right of jurisdiction, we may here observe, that three measures relating to private international law have

been passed in the last Session of Parliament, which are likely to remove many of the difficulties that have hitherto been frequently incident to questions of domicil. These measures are the Foreign Law Ascertainment Act, 24 & 25 Vict. c. 11, and the two Domicile Acts, 24 & 25 Vict. cc. 113 & 121.

The science of international law has a certain amount of special pleading of its own. Thus a convention of nude and absolute guaranty, made between two or more sovereign princes for the quiet enjoyment of their dominions, *contra quoscunque*, does not apply to political changes caused by internal revolution. A treaty of guaranty, as such, applies, notwithstanding the generality of its terms, only to the aggressions of foreign princes. Dr. Phillimore \* seems inclined to think otherwise; but Dr. Twiss clearly shows that special conveyancing, so to speak, is necessary to override the established rules of construction applicable to guaranties couched in general terms. This speciality of international contract shows that the international code, at least as regards the rights, as distinguished from the duties, of nations, has the force of law, and does not merely impose a bare moral obligation upon States; for the letter of the agreement should of course prevail if the general conventional rule of construction was not of equal, not to say paramount, authority.

The author's abhorrence of speculation is inordinate. He seldom offers an opinion or suggestion, even where the nature of the question appears to call for it. For instance, when discussing whether a claim for the extra-tradition of criminals is recognised by the common law of nations independently of treaty, he cites nine most eminent authorities in the affirmative, and fifteen of equally high rank in the negative. The practice of the leading powers, to which Dr. Twiss refers, certainly proves that no claim for the extra-tradition of any criminal is enforced by the international common law. Yet it is manifestly desirable that persons who have been guilty of murder or of any crime

\* Commentaries on International Law, t. ii. pp. 72, 75.

contrary to the laws of natural, as distinguished from political society, should be liable to extra-tradition. As long as the New World was imperfectly colonized, we can perceive a reason why American States should, after the ancient precedent set by Romulus, desire to extend the privilege of asylum. This right, if unrestricted, is certainly contrary to the law of nature, and should, we think, be condemned by every international jurist, as involving a violation of the first principles of natural law. The custom tends to engender a disregard of justice in international affairs, and to hold out a bounty on crime, especially at the present day, when locomotion is so readily available.

The method of investigation adopted by Dr. Twiss, in the construction of this treatise, is essentially inductive and historical. His definition of law, as "an ordinance of reason promulgated for common good," would seem to imply that at least some portion of juridical principles would admit of an *à priori* elucidation; those who, on the other hand, regard law in the light of "the enactment of the will of a superior power," might be expected to prefer the inductive method in their juridical inquiries. The author of a comprehensive treatise on international law, however, should not aim at directing the scope of his investigations by means of a single method only. The continental jurists afford ample data for an eclectic collection of international laws, considered in the light of first principles. But the historic or inductive mode of treating this subject has had but few votaries. A defect as to historic data is of course more serious than an error in point of speculative or *à priori* principles. As the deductive development of a rule of international law depends in a great measure upon the degree of cognate relation which such rule may bear to first principles, so, on the other hand, its practical importance will be found to vary directly in proportion to its conventional nature. The more deeply it is founded in custom alone, the more stringent is its obligation, and the more easily may that obligation be proved. The historical details in this treatise



are very copious. The author has, perhaps, devoted too much attention to what are merely phases of sovereignty, and too little to modifications of independence. He ought not, we think, have so strictly limited the range of his inquiries to the era inaugurated by the Peace of Westphalia. A brief description of the foundations which supported international society prior to that period, and which still continue to uphold the elaborate structure of modern European law, would have constituted appropriate matter for an introductory chapter. Some account of the influence of ancient law upon the framers of the international code would also have had its use in the treatise: nor should the influence of Christianity and of the See of Rome in the cementing of modern nationalities have been left wholly unnoticed. There are few, if any, historical events, however, bearing important practical relations to any portion of the present international code, which have not been stated by Dr. Twiss in sufficiently ample detail. The defects of the work consist in its inadequate appreciation of the importance of the natural elements of the international code. The diction and style of the treatise, as the reader may collect from the foregoing quotations, are easy, fluent, and unambitious; caution, statement, and refined analyses, without any bold attempt to grasp and classify first principles, characterize the work throughout. Its practical merits, however, are very considerable. It is lucid and orderly in the arrangement of its parts, and appears to omit nothing that can throw light upon the practice of nations. It indicates correctly the present stage of international jurisprudence, but does not appear to be on the whole, calculated to advance much the interests of juridical science. As international law is essentially *avide des faits*, the want of an index is a considerable drawback to the utility of this treatise, the numerous and varied details of which are not, and, indeed, could not be, indicated or suggested by a table of contents.

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## ART. IX.—RAM'S TREATISE ON FACTS.

*A Treatise on Facts as Subjects of Inquiry by a Jury.* By  
JAMES RAM, Esq., of the Inner Temple, Barrister-at-Law.  
London: William Maxwell.

**M**R. RAM has achieved the triumph of making romance and poetry the staple materials of a legal treatise. Extracts from the novelists, varied with hexameters, epigrams, odes, and blank verse, are scattered broadcast upon its pages. The greater portion of the introductory chapter is made up of lengthy quotations from Wordsworth and Shakespeare, while the last line in the book is transcribed from Milton's "Paradise Regained." Throughout the volume the foot-notes exhibit in novel juxtaposition such references as the following:—"Way v. East, 2 Drewry, 72, and 'Ivanhoe;'" (p. 190;) "'Frost's Trial,' (taken by Gurney,) 'Romeo and Juliet,' Act v. sc. 1, 8 Vesey, 476, and 'Twelfth Night,' Act v.;" "'The Vicar of Wakefield' and 1 Taunt. 292." A couplet or epigram *à propos* of the subject frequently imparts grace and piquancy to the style of a writer; but when paltry truisms are solemnly enunciated to foist upon the reader long passages from the "Noctes Ambrosianæ," or the "Satires" of Juvenal, it is not simply bad taste, but pedantry. To prove that smoke and falling snow may interrupt the vision, four lines are adduced from the eighth book of the "Æneid," to which Dryden's translation is subjoined. Upon the authority of copious extracts from "Henry IV." and "Romeo and Juliet," jurymen are no longer to question the fact that to put the ear close to the ground is an approved way of listening for footsteps; out of the twenty pages which make up the chapter on "suspicion," thirteen are entirely devoted to selections from dramatic poetry.

In the fifth chapter we are informed that there is "sometimes a mutual recognition of the person between two, although one of them is in disguise." The same may be affirmed, we apprehend, if both were in disguise; but it is consolatory to think that this never occurred to the author, else we might have been inflicted, by way of illustration, with thirty-six instead of eighteen lines from Cowper's "Retirement."

"What power there is in a keepsake to call to mind the giver of it," (p. 33,) is illustrated by a long quotation from "Noctes Ambrosianæ," vol. ii. p. 264. We had been under the impression that such propositions as the following were self-evident or too trifling to be gravely propounded:—viz., that "it is often the habit of a person to sign his name in his ordinary style of writing," (p. 55) that "there is no probability more often thought of, and talked about, than that of the coming weather," (p. 113) that "a suspicion which a person entertains may be grounded on something he either sees or hears," (p. 90;) that "a lasting alteration of countenance may be occasioned by an accidental disfiguring the face, causing an injury to an eye, the nose, or other feature;" and that "long-continued mental distress, or bodily sickness, or hardships, will make sad inroads on a face, quite despoiling it of the countenance it possessed before misfortune arrived." (P. 59.) What sceptic would for a moment doubt, that "a countenance is liable to temporary alteration?" or that "some passion, as joy, grief, anger, fear, will produce an instantaneous, and often great alteration in its appearance?" or that "an injury to the brain, by a blow or fall on the head, is a common cause of temporary inability in the person who received it, to give an account of the circumstances under which it took place?" (p. 45;) or, lastly, that "speed is greatly governed by the nature of the ground passed over, being accelerated or retarded by the evenness or roughness of it, and by its form of plain or hill?" (p. 74.) Upon paltry common-places like these, Mr. Ram has loaded the pages of his book with fragments in verse and prose, from

ancient and modern literature, exhibiting side by side as much versatility of talent as poverty of judgment.

In the pupillage of authorship, it is not uncommon for a young writer to have at his elbow a book of quotations indexed alphabetically on most ingenious principles. If by chance the pen should stick in some unfortunate imbroglio, a smart antithesis or rolling hexameter is forthwith turned up, and the aspiring *litterateur* bows himself out with the consciousness of having written a pretty thing. Showy books have been compiled in this way by versatile empirics. Mr. Ram, no doubt, is above such scheming; perhaps literature is his hobby. Lyrics, elegiacs, and epics, ancient and modern, may be as familiar to him as the months of the year, or the days of the week, to ordinary beings. It is a valuable gift, this capacity for remembering good things. The wonder is, that the treatise on facts has not extended to some half a dozen volumes. Like a conjuror's trick, Mr. Ram's method is so simple when we know it. State a proposition—if it be a platitude, no matter; there will be a subject and predicate at all events—extract a few pages from “Marmion,” or the “Anabasis,” or from Gulliver's Voyage to the “Houyhnhnms,” containing one or more of the terms of the proposition, and so on, till all the poets, romancists, and historians, are exhausted.

The morality of trade is a common subject of satire. Tampering with the constituent elements of chicory, mustard, or sugar, is branded with the opprobrious epithet of adulteration. Statesmen and jurists have deliberated upon the dishonest use and imitation of a rival's trade-marks. Does not the trade of book-writing come within the ambit of ethics? We submit that an author is bound in good conscience, before sending a book out upon the world, to ask himself the question, *Cui bono*? The heroic suppression of the *cacoëthes scribendi* may, in some instances, rise to the dignity of a virtue. Mr. Ram's treatise was ostensibly compiled for the guidance of juries; perhaps the edification of the bar and the bench was also contemplated. That it is a harmless work, abounding in apothegms, elabo-

rately illumined by passages from the ancient and modern classics, is the highest praise that the most friendly critic can bestow upon it. *Caveat emptor* is a sharp maxim, which may be found useful at the book-stall as well as in the market place. What instruction can a British juryman hope to derive from long chapters in which propositions like the following are solemnly enunciated?

"A man may be either far-sighted or near-sighted."

"A fact once in complete existence, once ended, admits of no addition, no subtraction:—once in existence, it is irrevocable."

"The eye has capacity to see many objects at one time."

"Light may give one person a great advantage over another in discerning objects."

"When an object is at a great distance from a person looking at it, his perception of it may be very different from what it would be, if the object were near him."

"One sound may drown another."

"There is a power in the mind to retain an impression of things by the eye or ear."

"A written memorandum is a transcription of an impression on the mind."

"Illness or old age often impairs, and sometimes wholly destroys, the power of remembrance."

"A thing is sometimes singular or rare. Often a thing is not singular nor rare."

"No two faces are alike."

"A temporary change may also be artificially caused. The wearing or loss of moustaches or whiskers may have this effect. So may the temporary wearing on the head of false hair or a wig. This we learn from the Vicar of Wakefield and his respectable acquaintance, Mr. Jenkinson."

Like Aristotle and Kant, it may happen that Mr. Ram assigns the greater merit to his method. A cursory glance at the contents reminds one of the index to Reid's "*Intellectual Powers*," or Locke on the "*Human Understanding*." There

is a scholastic air about a list of chapters entitled laconically thus: "On Perception," "On Impression," "On Memory," "On Recognition," "On Probability," "On Self-Conviction," &c., &c. It has the appearance of laying down the groundwork of a compact superstructure. We reconcile ourselves to the hard necessity of passing through the profundities of transcendental science, in order to arrive finally at the lore of wisdom, by which all future jurymen are to be guided and enlightened. All the science in the book, however, is confined to the methodical index. Where the author would fain be logical, he is simply obscure. The initial proposition in the introductory chapter exhibits a fine mockery of the profound. The oracular grandeur of the truism would have been lost if written in good English, and on this account we presume the definite article is contemptuously omitted. "Subjects of Jurisprudence are, Facts and Laws: facts are the source and cause of laws." Why Facts and Laws? Is it not equally true that subjects of jurisprudence are men and things, and that men are the source and cause of laws? Or to take the other term, would it not be as vague and useless to affirm that the subjects of political economy, *physique sociale*, of chemistry, or of psychology, are Facts and Laws?

The following paragraph furnishes a good example of the author's metaphysical acuteness:—"If a thing be perceived by any sense of the body, or faculty of the mind, the perception is a fact. If anything is seen or heard, the seeing or hearing of it is a fact. If any emotion of the mind is felt, as joy, grief, anger, the feeling of it is a fact. If the operation of the mind is productive of an effect, as intention, knowledge, skill, the possession of this effect is a fact. If any proposition be true, whatever is affirmed or denied in it is a fact. A. said this or that, or did this or that; if these propositions be true, then that A. did so say, or did so do, is a fact."

We are glad, in conclusion, to advert to the chapter on advocacy. In the course of some two hundred pages the fatal passion for poetry and fiction has evaporated, and we have in

chapter twelve a residuum of calm, good sense. The style of writing is strong and clear. The anxious litigant and aspiring advocate may here find sound practical maxims; the result, no doubt, of thoughtful observation. The following story is well told, in illustration of the danger incurred by a prisoner who undertakes to conduct his own defence. The author premises, "Supposing on a criminal trial the prisoner's character, independently of the present charge against him, is bad; and supposing in the course of the evidence this unpropitious fact comes out; then, if the accused pleads his own cause, there, in the dock, he stands, full in view of the jury, in close converse, it may be said, with them; no screen between them to intercept the admission of dislike, disgust, which his countenance, his manner, his past bad behaviour, may tend to inspire. . . . This case has occurred. A man on his trial for murder pleaded his own cause. A principal witness against him was a young woman, who, at the time of the crime imputed to him, lived with him as his housekeeper. Her he had seduced and promised to marry, a promise he did not fulfil. During her examination the sight of the prisoner caused her great distress; she rarely looked at him, but when she did so for a moment, her tears began to flow, and her voice was choked by emotion, so as to be almost inaudible. At the commencement of the prisoner's cross-examination of her, she, after a momentary embarrassment, eyed him firmly. Her examination, in two days, lasted many hours, during which she twice retired to suckle her child, of which the prisoner was the father. Some questions which he asked her, relating to the connexion which had subsisted between them, greatly agitated her, and provoked this reproachful reply: 'You had promised me marriage; and' (weeping bitterly) 'you must do this to wound my feelings.' And later in the examination he met with this withering rebuke from her: 'I told you when you broke your promise, that, before you died, you would repent of not keeping your word. I told you you would

never prosper after breaking such a promise." The prisoner was—Rush.

The ethical bearing of advocacy is very ably argued, and with a summary of the reasoning upon this subject we propose to close this notice.

"Taking, then, a civil case, and supposing there to be an issue or question of law to be determined by the Court. If it be inquired whether an advocate can conscientiously take up the side which in his opinion is wrong, this inquiry may be met by the following consideration:—It may, it is presumed, be stated to be a principle, applicable to the present inquiry, that the Court does not need to be instructed in the law of the particular case of the advocate on either side. Then with regard to the advocate's own opinion of the law, this opinion may be wrong; he ought not to assume it to be right, and the decision of the point does not depend on his opinion, but on that of the Court. An advocate must not knowingly mis-cite any case or authority; but in laying before the Court any particular case or authority, he is at liberty to submit to the Court such purport or effect of it as he thinks will best sustain the interest of his client. He may even omit to bring to the notice of the Court any principle, case, or authority which he considers is opposed to his client's interests; for on the principle that the Court needs no instruction from the advocate, he may conclude that the Court is in possession of it. Taking another civil case, and supposing the issue to be a question of fact to be determined by the jury; in this instance it is essential to justice that the witnesses give in evidence all the facts which, of their own knowledge, they are acquainted with. If then, after an advocate has, in his examination of his own witness, brought out certain facts, which support his client's case, he is aware that the witness is also in possession of another fact, which, if made known, he thinks would hurt or endanger his own client, and in proportion assist his adversary; under these circumstances the advocate must, it is imagined,



find himself in this strait:—if he questions the witness on the particular fact, his answer may prejudice his client's cause; and if he omits to examine the witness upon it, then, to the extent of the concealed matter, the advocate risks making himself a conniver at injustice towards the other side; for he cannot be sure either that the witness will, without any examination upon it, divulge the omitted fact, or that the opposite side will, on cross-examining the witness, elicit it out of him.

“To notice next the case of a criminal prosecution. If it be inquired whether an advocate can, with a safe conscience, plead for a prisoner, or other accused person, who, he believes is guilty, the question suggests these observations:—The advocate's belief of the guilt may be formed from the circumstances disclosed in his instructions for the defence, or even from the express confession of the accused person to the advocate himself. On a criminal prosecution, one principle acted on by the English law is, that no one is bound to convict himself; another is, that the *onus probandi*, the burden of proof of the offence charged, lies on the party prosecuting. These principles exempt the advocate of any one accused from all obligation to divulge, through his examination of the witnesses, any fact, of which the advocate may happen to have knowledge, and which he thinks will be injurious to his client. The conscience of the advocate cannot be hurt except by a breach of his duty. He owes no duty to the public, nor to anyone, to disclose the accused person's guilt; his whole duty is to his client; and this duty is to take care that his client have justice.”

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#### ART. X.—MARTIAL LAW IN AUSTRALIA.

IN the southern part of New South Wales, in the direct line (it cannot be called road) between the township of Yass and the frontier of Victoria, is a small mining district

or gold field, which bears the name of Lambing Flat. It acquired that name, we presume, because it happened to be that part of some squatter's domain where his ewes were wont to congregate at the season of parturition. For some reason or other Lambing Flat became the favourite resort of a number of Chinese, and in the latter end of 1860, or beginning of 1861, certain feuds arose between the Europeans and Celestials, which led to disturbances. A determination on the part of the Europeans to expel the Chinese was evinced at the time we have mentioned, and various steps were taken by the New South Wales Government to protect the weaker party, but without any marked result. In July last the police had arrested a few Europeans who had been unusually demonstrative in their opposition to the Chinese, and they were confined in the lock-up of the police-station. Hereupon an armed organization on the part of the Europeans took place, in order to liberate the accused. The police numbered about fifty, the insurgents about three thousand. The parties came to blows, and five or six of the rioters, or "rowdies," as we find them called, were killed and several wounded, and some three or four of the police were also wounded. This excited the Europeans to a sort of indignation frenzy. A new "organization" was initiated, the results of which was, that the police abandoned the place and retreated to Yass. This naturally alarmed the Government. Troops were sent from Sydney to Lambing Flat, and to give to this little band, numbering it is said not more than 125 men, a degree of moral force beyond the mere military display, the Governor of the colony had proclaimed martial law.

This expedient has often been resorted to by colonial governors, especially in the Southern colonies, during the last twenty years. Sir George Grey did so in New Zealand, in 1845; Sir Charles Hotham did so in 1854, on the occurrence of certain disturbances at Ballarat in Victoria; Governor Gore Browne resorted to the same expedients in New Zealand on the occasion of the celebrated Wirimu Kingi's armed

resistance of the invasion of his *mana*, or tribal right, or manorial right, or by whatsoever name it may be called, in February, 1860.

This ready resort to the proclamation of martial law, on the part of four of our governors in three of our Southern colonies, seems to be so repugnant to all our constitutional notions, that we propose to devote a few pages to the consideration—not of the policy, but of the legality of the expedient. For this purpose, we have nothing more to do with the merits of the Chinese dispute at Lambing Flat. The land question at Taranaki is equally beside the purpose. The Ballarat riot—serious enough at the time to frighten a Colonial Secretary from his post, and to generate a batch of colonial State trials—has been forgotten in the subsequent orderly state of Victoria, and the greater practical importance of subsequent events; and we only allude to these little great events—little to us—great, at the time, to the colonies—as an introduction to the somewhat momentous question upon which we propose to enter. Is the proclamation and exercise of martial law in our colonies legal or illegal?

The governor of a colony exercises a delegated authority. All the power which he wields and exerts he derives from the Queen. He does not, as we shall see hereafter, exercise all the powers and prerogatives of the Crown, but only such parts thereof as he is authorized to administer. His powers are limited and defined by the instruments by which those powers are communicated to him. Of course the Queen cannot confer upon him powers which she herself does not constitutionally possess. What, then, are the Queen's powers and prerogatives as to the exercise of martial law? because, if she hath none, she can communicate none.

The non-existence of this power in the Crown seems to have been completely settled by the Petition of Rights, (1628;) and on the eve of that great enactment during the injudicious and unpopular Spanish war, (1626,) we find, from a passage in Rushworth, that “the companies of soldiers (who had then

recently returned from Cadiz) were scattered here and there in the bowels of the kingdom, and were governed by martial law. The King gave commissions to the lords lieutenants, and their deputies, in case of felonious robberies, murders, outrages, and misdemeanours, committed by the marines, soldiers, and other disorderly persons joining with them, to proceed, according to certain instructions, to the trial, judgment, and execution of such offenders, as in time of war; and some were executed under these commissions."—*Rushworth*, vol. i. 419.

It will be observed that these commissions, so far as we can rely on the authority of "Master Rushworth, a young clerk of the Parliament," were confined to soldiers and marines, who would be subject to the military law in England, and to "other disorderly persons joining with them," who would have been subject to military authority if composing part of the army in the field *flagrante bello* (*Darwin v. Keppel*, 2 Wils.) Yet although so confined to persons under the military law when in the field, and therefore, in that day, having some colour of legality, the commissions for the exercise of martial law within the realm were condemned as illegal by the Petition of Right. This great bulwark of our liberties, "which every Englishman carries with him to the colonies as part of his birthright," (Chalmers' Opinions,) commences by reciting the "grievance and vexation" of having "great companies of soldiers dispersed into divers countries of the nation," and of the inhabitants "being compelled to receive them against their will." It then recites the statute of Edw. III., whereby it is "declared and enacted that no man shall be prejudged of life or limb against the great Charter and law of the land." It then complains that "divers commissions had issued, giving to certain persons power and authority to proceed within these lands according to the justice of martial law, . . . by pretext whereof some of your Majesty's subjects have been . . . put to death, when and where, if by the laws and statutes of the land they deserved death, by the same laws

and statutes also they might, and by no other ought to, be judged and executed." The petition then prays that the aforesaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter "no commission of a like nature may issue forth, . . . lest by colour of them any of your Majesty's subjects be destroyed or put to death, *contrary to the laws and franchises of the land.*"

To this petition Charles very reluctantly assented, and it became part of the law of the land. Strictly, however, it enacted nothing new. It was declaratory of the law which had been in existence—we can hardly venture to say in force—for centuries, under a succession of Charters (5 Edw. III. c. 9, 25 Edw. III. st. 5. c. 4, 28 Edw. III. c. 3,) which, however, had been habitually violated by succeeding sovereigns, and almost forgotten by the people. This celebrated Act is said to have been drawn by Sir Edward Coke, and, so far as martial law is concerned, it has never been violated since the "Great Rebellion."

There is a curious anecdote connected with the debates on the Petition of Right, which further illustrates the subject. In a conference between the two Houses of Parliament, Serjeant Ashley, the King's serjeant, advanced the dangerous and unconstitutional doctrine of the existence of a species of law which he called "the law of the State," or "the law of State necessity," (as a justification of the obnoxious commissions,) which proceeded not by the law of the land, but by *natural equity*. This doctrine appeared to their lordships so very mischievous, that, upon the motion of the Earl of Warwick, Ashley was ordered into custody for advancing it. Yet he admitted that martial law was not to be exercised in time of peace, *when recourse may be had to the King's Courts*, (*Parl. His.*, vol. ii. pp. 315, 329.) This last sentence really defines the state of war and peace. So long as the King's Courts are open there is no state of war. There may be insurrection—there may be rebellion—but it is not war. But *inter arma silent leges*; and it is said that when a country is

completely disorganized by war, and the courts of justice have been violently closed, or cannot possibly continue to sit, the exercise of martial law becomes legal. But what meaning has the word "legal" in the above substance? During such a state of anarchy, *silent leges*, there is an end of all law. What is called the law of the strongest must prevail. But this is no law at all; and it is fortunate if force, not law, is so used as to become a tolerable substitute for the law which has been silenced, and afford some protection to the people.

The opinions of the best lawyers in the debate on the Petition of Right were decidedly against the legality of martial law. They all assert that the exercise of martial law in time of peace is illegal, and that it is only capable of being exercised out of the king's dominions, over military persons and *flagrante bello*. They also show that the test of war or peace within the kingdom is whether the King's Courts are open or closed, and they lay down the principle that insurrection or rebellion is not war, for if one be taken in rebellion, he must be tried in the King's Courts. The speeches in full will be found in Rushworth, vol. iii. app. 81. Here is an abstract of them:—

Lord Coke said, "I shall maintain *jus belli*. But God send me never to live under the law of conveniency or discretion. Shall the soldier and the justice sit on one bench? The trumpet will not let the crier speak in Westminster Hall. *Non bene conveniunt*. The time of peace is when the Courts at Westminster are open, for when they are open you may then have a commission of oyer and terminer, and when the common law can determine a thing the martial law ought not. Drake slew Doughty beyond sea. Doughty's brother desired an appeal to the constable and marshal's courts, and Wray and the other judges decided that he might there sue. We make no law. We must not mediate *ubi lex non distinguit*. To hang a man *tempore pacis* is dangerous; I speak not of prosecution against a rebel. He may be slain in the rebellion, but if he be taken he cannot be put to death by martial law. (Year Book, 28 Edw. II. M. 13.) When courts of law are



open, martial law cannot be executed, (5 Hen. IV., 30 William-son's case.) The constable and marshal desired an addition to their commissions and they proceeded against some according to that power; but because it was not according to their ancient power it was void, for they cannot do anything according to the additional power, (*i.e.*, power to exercise martial law,) and there was a (writ of) prohibition to stay their proceedings under the additional power. How shall the soldier know how to obey them; they are not under the great seal?"

Mr. Banks said, "We have no time of war when the King's Courts are open;" and Mr. Noy laid down a similar proposition. Mr. Mason, of Lincoln's Inn, admitted that in time of war, when the King's Courts are closed, the common law allows the exercise of martial law when an army is in the field; but he asserted that a rebel taken ought to be tried by his peers. "We have now," (1628,) he continued, "no army in the field. We have no enemy except among ourselves, and it is no time of war, therefore the commission (to exercise martial law) is not fit nor warranted by law." Mr. Rolle, afterwards Chief Justice, followed. "If," said he, "the Chancery and Courts at Westminster be shut up, it is time of war; but if the Courts be open, it is otherwise. . . . If an enemy come into any part where the common law cannot be executed, there martial law may be executed; but if a subject be taken in rebellion—not slain at the time of his rebellion—he is to be tried after the common law."

The illegality of martial law, even for the government and discipline of the military, is annually reiterated in the preamble of the Mutiny Act; and every school-boy is taught to lisp this as one of the constitutional safeguards of personal liberty: "And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishments within the realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm."

Military law and martial law are sometimes confounded. Military law is exercised by the authority of Parliament, and the Mutiny Act annually passed, together with the Articles of War framed by Her Majesty, and the printed regulations from time to time issued for the government of Her Majesty's troops. Martial law may, no doubt, be established by an Act of Parliament; but what we are now considering is the authority of the Crown in that behalf. Martial law has been established in Ireland by authority of Parliament, and it has sometimes been proclaimed without such authority. The former is legal, as Parliament is omnipotent—the latter is illegal. Lord Loughborough, in the case of *Grant v. Gould*, 2 Hen. Bl. 69, draws this distinction very clearly. "Martial law," says that able Judge, "such as is described by Hale, and such, also, as is marked by Sir William Blackstone, does not exist in England at all. When martial law is established in any country, it is of a totally different nature from that which, by inaccuracy, is called martial law, merely because the decision is by a court-martial; but which bears no affinity to that which was formerly attempted to be exercised in this country, which was contrary to the constitution, and has been for a century (this was said in 1792) totally exploded." Another century has nearly elapsed, and we find the "exploded" expedients revived in a part of the empire considered, perhaps, too remote to be within the reach of the public opinion of the mother country.

Such, then, was the state of the law long before the oldest of the Australian colonies was established. These colonies took the law of England in force at the date of their establishment, respectively, "so far as the same was suited to their circumstances and condition,"—which would include all those guarantees of personal security and freedom which have been, from time to time, wrested from the Crown by the courage, and sometimes by the blood, of our ancestors. The martial law which we are now condemning, and which Lord Loughborough so clearly distinguishes from the military law autho-



rized by Parliament for the government of the army, is similar—nay, identical—with that which is exercised when our armies are in the field in a foreign country. When our armies are in an enemy's country, *flagrante bello*, the troops are governed by the Royal prerogative. In a foreign country we cannot have Courts. But even in this case the Queen's regulations are followed as nearly as possible. In the case of *Barwis v. Keppel*, 2 Wils. 314, the Court said, "By the Act of Parliament to punish mutiny and desertion, the King's power to make articles of war is confined to his own dominions. When his army is out of his dominions he acts by virtue of his prerogative, and without the statutes and articles of war, and therefore you cannot argue upon either of them, for they are both to be laid out of the case. *Inter arma silent leges*. We think, as at present advised, that we have no jurisdiction at all in this case."

Martial law has sometimes been proclaimed in Ireland without the authority of Parliament. In America, before the declaration of independence, the governors were empowered so to do by a clause in their commissions, since omitted. From these two precedents it may be concluded that, although no power to exercise martial law in England exists, yet the Crown has such power in Ireland and the colonies, and may therefore still delegate it to lords-lieutenant and colonial governors. Let us examine these two opponent precedents. As to the case of Ireland, what reader of history does not recal to mind the noble conduct of Lord Kilwarden in the case of Theobald Wolf Tone? Tone had been taken in open rebellion on board a French ship of war. He had been tried by a court-martial under a proclamation of martial law, had been condemned to death, and was actually in the hands of the provost marshal, as the military hangman is called. Curran, in breathless haste, rushed into the Court of King's Bench then sitting, and in Tone's name demanded of Lord Kilwarden a writ of *habeas corpus*. It was at once granted. "But, my lord," urged Curran, "while the writ is being prepared my

client dies;" whereupon the sheriff was ordered to repair to the place of execution and command the provost marshal to produce his prisoner. The functionary pleaded the orders of his commanding officer, and refused to obey the mandate of the Court. Upon this being reported to Lord Kilwarden, the commanding officer and the provost marshal, with his prisoner, were ordered to be arrested and brought into Court. Tone thus being saved from the rope of the military hangman, was committed to the custody of the civil power for trial, for there was plenty of evidence against him to justify his detention; and he afterwards anticipated the inevitable result of a trial for high treason, by committing suicide in gaol.

Another case in which the dignity and authority of the King's Courts was nobly upheld against military usurpation, though not a case of martial law, but rather of the abuse of military law, deserves a place here. In the year 1746, one Lieutenant Frye, of the Royal Marines, had been illegally punished under the sentence of a court-martial lawfully held, the sentence, however, being in excess of the power of the court. He brought an action against Admiral Ogle, and recovered £1000 damages. In the course of the trial, Lord Chief Justice Willes intimated an opinion that every member of the court was liable to an action for the illegal sentence. Upon this, Lieutenant Frye issued writs against Admiral Mayne and Captain Renton, two of the members of the court, and they were served with the writs as they were returning from another naval court-martial upon Admiral Lestvey. This was resented "as an insult" by the members of the last-named court, and they passed some resolutions highly derogatory to the Chief Justice. These they forwarded to the Lords of the Admiralty, by whom they were reported to the King, George II., who signified to their lordships, through the Duke of Newcastle, "His Majesty's great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected." But the Lord Chief Justice was not a man to be overawed in doing his duty, even by the

frowns of royalty ; and as soon as the resolutions were communicated to him, he ordered all the members of the court into custody for their contempt, and was proceeding to uphold the dignity of the Court in a very decided manner, when the whole affair was terminated in November, 1746, by the members of the court-martial signing and sending to the Chief Justice a very ample written apology and submission for their conduct. The paper was read aloud in the Court of Common Pleas, and was ordered to be registered among the records of the Court, where it is still to be found, "as a memorial," said his lordship, "to the present and future ages, that whoever set themselves up in opposition to the laws, and think themselves above the law, will, in the end, find themselves mistaken." The proceedings and the apology were published in the *London Gazette* of the 15th November, 1746, and will also be found in the *Gentleman's Magazine* for that year.

As to the case of the old colonies in America, there can be no doubt that the old commissions did contain a clause empowering the governors to exercise martial law, but it was expressly limited to "times when *by law* it may be exercised." But it should be remembered, that before the declaration of independence, wars had frequently been carried on between the "provincials" and the French of New France, without much aid from the parent state ; it was, therefore, considered necessary to give to the provincial governors ample powers to levy troops, to command them when levied, and to govern them at all times. Accordingly the governors were clothed with full powers and authority to "levy, arm, muster, command, and employ all persons whatsoever residing in our province or —, and other territories under your government, and, on occasion shall serve, to march them from one place to another, and to embark them for the resisting of all enemies, pirates, and rebels, both at sea and land, and to transport such forces to any of our plantations in America, if occasion shall require for the defence of the same against all enemies, . . . and to

execute martial law in *times of invasion* and other times *when by law it may be exercised.*"

It cannot fail to strike the constitutional reader, that great care has been taken to confine this power within legal boundaries. Can it be supposed that the clause was intended to convey, what it could not convey, powers which the king himself has not possessed since the Petition of Right? It was meant to authorize the governors to exercise one of the royal functions, which, without authority under the Great Seal, he could not exercise—namely, to raise troops, recruit them, move them from place to place, even out of the territorial jurisdiction, and govern them according to military law—that is, by the articles of war when at home, and by the prerogative when in a foreign colony, and when in the field *flagrante bello*. The commission to General Murray, after the conquest of Canada, contained a similar clause, but it was dropped 'out soon after the American troubles commenced. Why? Not because it was illegal, as above limited; not because it had been illegally executed; not because the people of America had included it among their grievances; not because it had ever been used to oppress the people; not, indeed, out of any tender consideration for popular liberty; but simply because the jealous policy of the Government of that day deemed it wiser to employ regular troops, and even foreign mercenaries, than to train angry colonists to the use of arms, and teach them the art of war. It was under the authority of this clause that Washington was converted from a district surveyor into a provincial soldier. It was in one of the border wars that he gained his first renown.

The whole language of the clause in the old commissions—which will be found printed at length in Baron Mazère's collection, entitled "*Quebec Commissions*," 4to., 1772—as well as the mode in which it was interpreted and exercised by the provincial governors, shows that it was not intended to operate—and did not, in fact, operate—beyond the legal powers of the

King. But if it were so intended, either wilfully or by misapprehension, there is no trace of it in any governor's commission for nearly a century. If the King of that day usurped power in the colonies, the Queen of this day certainly does not.

As the power of proclaiming and exercising martial law is not expressly given to the governors of the Australian and other colonies, have such governors any such authority irrespective of their commissions?

The extent of the powers of the governor of a colony has been determined by a great number of judicial decisions. He is not the general representative of the Queen. He does not exercise all the prerogatives of the Crown. He can only exercise such powers as are delegated to him by his commission, or in some instances by the charter of the colony, or by some equally binding instrument, under the Great Seal of England, by which alone the Queen can confer powers upon her colonial governors. Beyond the powers thus specifically conferred upon him, he cannot legally travel; and if he exceed them, he renders himself liable to an action at the suit of the party injured, and even to an indictment, if the infringement of his powers amount to a criminal offence. We proceed to support these propositions by judicial decisions.

In the case of *Fabrigas v. Mostyn*, 20 State Trials, Governor Mostyn had taken upon himself to arrest and banish the plaintiff from Minorca to the Spanish Main, under a false imputation of alleged treasonable practices. The plaintiff followed the Governor to England, brought an action against him, and recovered £4000 damages. The Court refused to set aside this verdict, and Lord Chief Justice de Grey, in the course of his judgment, observed, that "the governor is the king's servant, his commission is from him, and he is to exercise the powers he is invested with by his commission which is to execute the laws of Minorca."

The next case to which we shall refer in which this limitation of a governor's power is judicially asserted, is *Camero*

*v. Kyte*, 3 Knapp, P. C. Cases, 332. The principle had been laid down by Lord Mansfield in *Campbell v. Hall*, Cowp. 210, that the king can make laws for a conquered colony. The Governor of Demerara had assumed that, as the king's representative, he could do so likewise; and he exercised that power by an ordinance increasing the commission of the vendue master, or official auctioneer of the colony. The plaintiff brought an action for the excess of commission levied by the vendue master, and the case came before the Judicial Committee of the Privy Council. The Committee, in deciding that the governor had no such power, said, "The governor has not, by virtue of his appointment, the sovereign authority delegated to him; and an act done by him on his own authority, unauthorized by his commission, or expressly or impliedly by his instructions, is not equivalent to an act done by the Crown itself, and is consequently not valid." The language of Lord Brougham, in delivering judgment in *Hill v. Bigge*, 3 Moore P. C., 476, is to the same effect. "If it be said that the governor of a colony is *quasi-sovereign*, the answer is, that he does not even represent the sovereign generally, having only the functions delegated to him by his commission, and being only the officer to execute the specific powers with which the commission clothes him."

Numerous cases might be cited in which colonial governors have been sued with success in the Courts at Westminster for acts done in excess of the powers conferred upon them by their commissions, or under an erroneous estimate of their own authority. In *Wall v. Macnamara*, cited 1 T. R., 536, the plaintiff recovered damages against the defendant, who had been Governor of Senegambia, for false imprisonment, attended with cruelty, the act being in excess of the governor's powers given to him by his commission. The plaintiff, Captain Wall, was afterwards appointed Governor of Goree, and not warned by his own cause of complaint against Governor Macnamara, he punished a soldier under colour of military law, but without any regular trial, so severely, that the man died under

torture. Governor Wall, on his return to England, was brought to trial at the Old Bailey for murder, and was convicted and hanged at Tyburn, in 1802. (28 St. Tr. 51.)\*

This branch of the subject may be appropriately concluded by an extract from the work of a very able colonial lawyer, written before the two last decisions had placed the subject beyond all doubt.

“I cannot close this paper,” says the writer referred to, “without making some observations on an expression which provincial baseness has brought into use, and which is calculated to convey very erroneous notions of the powers of governors to themselves and others. We every day hear the governor called the ‘king’s representative.’ Nothing is more inaccurate than the expression in the sense in which it is used. Constitutionally, the king is the fountain of all office, honour, and power, and each officer of the Government, deriving his authority from the king, represents the king in the exercise of his legal powers. This is true as well of the lowest as of the highest officers. It is as true of a constable as of the Lord Chancellor. In no other sense can it be rightly applied to the governor of a colony. None of the peculiar attributes of sovereignty, under the constitutional law of England, are applicable to that officer. The king can do no wrong. Is that true of a provincial governor? The king’s powers are original, inherent, perpetual. Those of a governor are derivative, temporary, and dependent on the will of him who conferred them. Constitutionally, the king is responsible to God alone for his acts. The governor is answerable to his royal master. The king is answerable to no human tribunals for the discretion which he exercises in displacing public officers. The governor is answerable to the King’s Courts at Westminster for the suspension or removal of any subject of the king holding an office of emolument in the colony. That an expression such as this should have obtained currency is of

\* And see *Glynn v. Houston*, 2 Man. & Gr. 337; *Wyatt v. Gore Holt*, N. P. 299; *Bradby v. Arthur*, 4 B. & C.; *Oliver v. Bentinck*, 3 Taunt. 456.



itself pregnant evidence of the servility of that class of the colonial society, where it has long been, and still continues to be in daily use.”—(*On the Functions and Duties of the Governor of a British Province*, by A. Stuart, Advocate, Montreal, 1832.)

The principles which we have endeavoured, and we trust successfully, to establish, may be thus recapitulated:—

1. The Queen of England has no power or authority to exercise martial law either in Great Britain or in the colonies.

2. Within the limits of the Queen's dominions the army and all persons belonging thereto, and under military authority, are to be governed by the Mutiny Acts and the Articles of War.

3. This military law is distinct from, and therefore not to be confounded with, what is called martial law, which is illegal.

4. When the Queen's troops are in the field in a foreign country and *flagrante bello*, they are to be governed by the royal prerogative.

5. These rules do not extend to civil persons not amenable to military authority.

6. The Queen cannot impart to a colonial governor powers which she does not possess, and she has not done so.

7. The governor of a colony is not the general representative of the Queen, and can only exercise the powers lawfully delegated to him by the Queen's commission.

8. Hence:—the exercise of martial law by the governor of a colony is illegal, and would even be so if such power were included in his commission. Not being so included, its exercise amounts to a double usurpation.





## Notices of New Books.

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[\* \* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**The Law of Sales of Personal Property.** By Francis Hilliard. Second Edition, greatly enlarged and improved. Philadelphia. 1860.

THIS is one of those valuable treatises which come to us from the other side of the Atlantic and which are always received by the profession in this country with much satisfaction. Mr. Hilliard is favourably known as the author of two other important works—one on the law of vendors and purchasers of real property and the other on torts. The present treatise, as the author states in his preface, though in name a republication, is substantially a new book, the plan and arrangement having been changed and important additions made.

The subject of the law of sales of personal property embraces nearly all the most important questions connected with the law of contract not under seal. It is in connexion with this subject that the most difficult points relating to the law of contracts arise; and as contracts of this nature are more frequent than any other in a commercial, or indeed in any, community, and "create and constitute," as Mr. Hilliard observes, "the activity of human society," the law by which they are regulated is of constant application, and demands the most minute consideration on the part both of the practitioner and the student. A special treatise, therefore, on the subject, discussing every question and stating every point, is highly desirable. Such a treatise ought to go thoroughly into the whole matter, and, in fact, to exhaust the subject. Mr. Hilliard's book quite comes up to this ideal, and is second to no work of the kind with which we are acquainted either in general arrangement or in filling up. Admirable definitions are given, principles are clearly stated, and the gist of every case quoted is distinctly brought out. The object of the work is entirely practical, but the method of treatment is strictly logical. A large proportion of the authorities referred to are American, and throw much light on many important questions. We have no doubt that wherever the work is known it will be highly valued.

**The Common Law Procedure Acts of 1852, 1854, and 1860 ; with Notes, and the Forms and Rules : to which are prefixed or appended all the Acts (or Portions of Acts) relating to Common Law Procedure, or the Trial of Issues of Fact, in the Courts of Common Law, Chancery, or Probate, with the Rules of each Court respectively, adapted to the use of Practitioners in all the Courts, and also to the Use of Students. By W. F. Finlason, Esq., of the Middle Temple, Barrister-at-Law, Editor of the "Common Law Procedure Acts," 1852 and 1854. (V. & R. Stevens & Sons, 1860.**

Most of the enactments relating to Procedure in the Courts of Common Law and Equity, together with the forms of pleading, schedules, and rules of practice, are here incorporated in a portable volume for the special use of practitioners and students. It has been compiled on the simple plan of giving, in the order of time, a reprint of the whole or portions of such statutes relating to the subject, illustrating and explaining the same in comments upon decided cases. This being a book for reference rather than for continuous reading, it is important to state that the index is well-arranged and copious ; so that upon most of the questions which in the course of practice may arise, some information or direction will be readily found. In addition to the three principal Common Law Procedure Acts of 1852, 1854, and 1860, the following have been transferred from the Statute Book to the pages of this compendium :—The Interpleader Act ; The Statute of Limitations, 3 & 4 Will. IV. c. 42 ; The Act for Speedy Execution, 1 Will. IV. c. 7 ; Lord Denman's Act as to Costs ; Lord Campbell's Libel and Law of Evidence Acts ; together with the Bills of Exchange, the County Court, the Mercantile Law Amendment, and Divorce Court Acts.

The value of a book like this depends, in a great measure, upon strict adherence to some intelligible method, under the guidance of which the reader may be at once conducted to the information he requires. Should another edition be demanded, it would be advisable to append the schedules, interpretation clauses, rules, and forms, to their respective statutes in the usual way, instead of mixing them up with references to decided cases and learned disquisitions upon subjects embodied in the different sections.

Besides faults of arrangement, sufficiently indicated in the table of contents by the recurrence of the phrase "omitted in its order," there are some typographical errors in the notes which call for correction.

**The Criminal Law Consolidation Statutes of the 24 & 25 Victoria, Chapters 94 to 100. Edited, with Notes, Critical and Explanatory, by James Edward Davis, Esq., of the Middle Temple, Barrister-at-Law. London : Butterworth. 1861.**

THIS is a carefully prepared edition of the New Criminal Law Consolidation Acts, and will be found extremely useful for practical

purposes. The name of Mr. Davis will be a sufficient guarantee that the work has been done in a lawyer-like manner. There is a very ably-written introduction, in which the scheme of the new Acts is clearly set forth and correctly appreciated. The notes on the different sections, as might have been expected from the editor, are entirely to the point, whether their object be critical or explanatory. The sections of former Acts, on which the different provisions of the Consolidatory Statutes are framed, are accurately pointed out, and where any novelty is introduced it is carefully noted. The most important decisions on the sections in former Acts which are re-enacted in the present are concisely stated. Tables of offences punishable upon indictment and upon summary conviction present at a glance the particular offence, and a reference to the new and the old statute applicable to it, and the limits of punishment. There can be no doubt that Mr. Davis's edition of the new criminal law statutes will prove very serviceable both to magistrates and the profession; and until these statutes are incorporated in a text book on criminal law, we do not think that anything better can be desired than the present publication.

**A Brief and Practical Exposition of the Law of Charitable Trusts, with Special Reference to the Jurisdiction of the Commissioners of Charities; containing also all the Charitable Trusts Acts, with Notes: and the Rules, Minutes, and Orders, of the Court of Chancery and the Commissioners of Charities. By W. F. Finlason, Esq., of the Middle Temple, Barrister-at-Law. London: V. & R. Stevens & Sons.**

THE machinery for controlling the administration of property demised or bequeathed for purposes of charity has, of late years, been materially altered. The appointment of commissioners clothed with the power of instituting inquiries, compelling information, sanctioning or condemning schemes, with the additional advantage of a simple mode of procedure, has been the means of expediting business connected with charities upon more moderate charges than under the old system. It was with a view to these more recent changes that Mr. Finlason prepared this "Practical Exposition of the Law of Charitable Trusts." Ample information will be found as to the forms and rules to be observed in bringing matters under the notice of the Board; and in the former part of the book, the general principles of English law relating to this subject are deduced with much clearness from precedents and statutes. The comments upon the Roman Catholic Charities Act provoked an attack on the part of one of the leading organs of the Roman Catholic press, which conferred on the work a wider notoriety than its more sterling merits might have effected. The controversy (some account of which will be found in another part of the present number, in the article upon "Religious Trusts") turned upon the

section which provides "that no gift or disposition or any lawful or charitable Roman Catholic trust shall be invalid, by reason that the same estate or fund is also subjected to a trust deemed to be superstitious; but the Court of Chancery, or the Commissioners of Charities, may apportion the estate or fund so that a proportion of it may be subject to the lawful or charitable trusts declared, and the residue, to such lawful charitable trusts as the Court or Commissioners may consider most just."

The scope and meaning of this enactment may be found correctly stated in Mr. Finlason's treatise, and the general acquiescence of the ecclesiastics of that religious body, their alarm having proved groundless, might be taken as a recognition of the soundness and accuracy of his views.

**Medical Jurisprudence.** By Alfred Swaine Taylor, M.D., F.R.S., &c. Seventh Edition. London: Churchill. 1861.

PROFESSOR TAYLOR has so completely established himself as the recognised authority on Medical Jurisprudence, and his admirable volume is so well-known to the profession, that we can only say of the present edition that it maintains the reputation of its six predecessors. The latest cases bearing on the questions discussed have been carefully noted up, and the most recent discoveries of science are appropriately introduced. The book, in its present shape, should have a place in the library of every criminal lawyer; but it is perhaps deserving of a more lasting praise, as a testimony to the conscientious and searching way in which criminal justice is administered in England at the present time.

**The Bankruptcy Act, 1861;** incorporating so much as remain in force of the 12 & 13 Vict. c. 106; Bankrupt Law Consolidation Act, 1849; of the 15 & 16 Vict. c. 77; and of the 17 & 18 Vict. c. 119. With an Appendix containing the 7 & 8 Vict. c. 70; the 23 & 24 Vict. c. 33; the 23 & 24 Vict. c. 147, and so much as remain in force of the general rules and orders under the Bankrupt Law Consolidation Act, 1849; with Notes. By William Hazlitt, of the Middle Temple, Esq., a Registrar of the Court of Bankruptcy, and Henry Philip Roche, of Lincoln's Inn, Esq., Barrister-at-Law. London: V. & R. Stevens & Sons; H. Sweet; and W. Maxwell. 1861.

THIS is the most authoritative work that has appeared on the New Bankruptcy Act, written, as it is, by the two learned gentlemen who were instructed to prepare the measure; but as it sometimes happens that they who beget offspring are least alive to their offspring's faults, so we think that Messrs. Hazlitt & Roche have omitted some criticisms on the Act which are likely to be passed by less partial

judges. For instance, no allusion is made to the remarkable omission that occurs in the Act with reference to the discharge of the creditors' assignees. The *bill* provided (187th clause) that after a final dividend the creditors' assignee should submit his accounts to a meeting of the creditors, and then might apply to the Court for an order of discharge, which it was empowered to make. This was followed by other clauses declaring the effect of the order, requiring the assignee to pay unclaimed dividends into the bank, and that after his discharge the official assignee shall represent the estate and exercise all the powers which would otherwise have been vested in the creditors' assignee. The Act omits the first clause altogether and retains the others. The 180th section declares "the order of discharge shall operate to release the creditors' assignee," &c.; and the only order of discharge previously mentioned is the order of discharge of the bankrupt. Now, as such an error as this will certainly necessitate an amending Act, it would have been as well to have noticed it in a book that professes to give, *ex cathedrâ*, an explanation of the measure.

We think, too, that some acknowledgment of the source from which the Act, as well as the Bill of the preceding Session, was drawn, would have been at least graceful. None know better than the draughtsmen of the Bankruptcy Act that Lord John Russell's Bill of 1859 furnished them with their chief materials, and that most of the valuable, and all the really original, parts of the measure had this and no other origin.

We say this in no derogation of the work before us. It seems to be done, on the whole, with accuracy, and will be acceptable at the present moment to the practitioners in bankruptcy, and the profession at large.

**The Principles and Practice of Elocution considered in reference to the various Professions: being the substance of a Course of Introductory Lectures delivered at Oxford. By Charles John Plumptre. J. H. and Jas. Parker, Oxford and London.**

IN publishing these Lectures, Mr. Plumptre has aimed at giving, in a condensed form, the best practical guidance in the art of elocution. He urges the study of that art by every man who intends to enter professional life, or who is likely at any time to be called upon to address popular assemblies. Students for the bar could not do better than peruse this excellent little treatise.

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## Events of the Quarter.

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PARLIAMENT brought its labours to a close on the 6th of August, and though some desirable measures, as usual, fell through, enough was done before prorogation to stamp an enduring character on the Session. The Bankruptcy and Criminal Law Consolidation Acts constitute important additions to the Statute Book, and some minor measures, such, *ex. gr.*, as the Foreign Wills and Marine Store Dealers' Acts, afford proof that the Legislature is sincerely desirous to promote any useful improvements in our law.

We have been favoured with a copy of an Act to facilitate the transfer of land, which has been framed by the Legislature of Victoria, chiefly through the exertions of the Attorney-General for that colony, Mr. Ireland. It seems to embody the principles which have been so often advocated by law reformers in this country, and we shall be curious to hear whether its results bear out the expectations of its sanguine promoters.

The proceedings at the Fifth Annual Meeting of the Social Science Association, held in Dublin from the 14th to the 21st of August, are chronicled in our pages elsewhere. The growing success of the Association, and the concourse from all nations which the Exhibition is expected to gather in London next year, have decided the Council to hold their sixth Congress in the metropolis. The resolution is a bold one, and the more so that we believe no precedent exists for any meeting of a similar kind in London; but if the difficulties on the occasion be greater, it is certain that the materials for success are more abundant than in any provincial city.

The meeting of the Metropolitan and Provincial Law Association, recently held at Worcester, has been creditable to the Society, several valuable papers having been read, and a good practical address delivered by the President, Mr. Torr.

We have received an interesting account of the opening of the Melbourne Public Library, in Australia, and we are glad to observe that a selection of law books, numbering eleven hundred volumes, and accessible to members of the profession and law students, forms part of the collection.

At home the ceremony of opening the new Library of the Middle Temple, by the Prince of Wales, will be occupying public attention at the moment when these sheets are passing through the press. We heartily congratulate the ancient Inn on such an addition to its historical celebrity, its architecture, and its practical usefulness. Some perhaps would wish that the old fountain above had been permitted to remain in its simplicity; but it would be ungracious to deny the spirit of improvement that now animates the benchers,

of which the opening up of the noble church is another gratifying token.

The Council of the Incorporated Law Society, in the report recently presented to their members, speak of the position now occupied by their branch of the profession in language which we believe to be entirely just, and which we transcribe with unfeigned pleasure :—

“There is satisfactory evidence of a growing conviction among the members of the Government and the Legislature, that the profession as a body are deserving of confidence, and are judicious and disinterested promoters of law amendment, and are qualified by their experience and legal information to render efficient service in the correction of old abuses. There is a marked improvement in the tone of the public mind with reference to the profession; vulgar and unjust prejudices are giving way to a more enlightened estimate of their value as members of this great social community; and year by year increasing numbers of well-educated gentlemen, graduates of the universities, and others, are entering the ranks of the profession.”

The Council, we are glad to observe, are able to speak with confidence of the position and prospects of this valuable society.

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### APPOINTMENTS.

**THE Right Hon. Edward Cardwell** has been appointed Chancellor of the Duchy of Lancaster.

**George Whitlock Nicholl, Esq.,** of the Middle Temple, has been appointed Recorder of the borough of Usk, Monmouthshire.

**Joseph Rayner, Esq.,** Solicitor, has been appointed Town Clerk of Bradford by the Council of that borough.

**Ceylon.**—**Robert William Durand Moire, Esq.,** has been appointed Commissioner of the Court of Requests and Police Magistrate for the district of Mulletivoe.

**BRITISH COLUMBIA.**—**Henry Pering Pellew Crease, Esq.,** of the Middle Temple, Barrister-at-Law, has been appointed Attorney-General.

**GOLD COAST.**—The appointment of Advocate for the Forts and Settlements of this Colony has been conferred on **William Hackett, Esq.,** Barrister-at-Law, of Lincoln's Inn.

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## *Neurology.*

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### *July.*

- 15th. COWLARD, LETHBRIDGE, Esq., Solicitor, aged 24.
- 29th. KENNY, GEORGE, Esq., Solicitor, aged 57.
- 29th. JONES, FREDERICK, Esq., Barrister, aged 49.
- 30th. GROVER, JOHN THOMAS, Esq., Solicitor, aged 56.

### *August.*

- 3rd. GRAY, DAVID, Esq., Solicitor.
- 5th. MILLINGTON, HENRY, Esq., Solicitor, aged 70.
- 15th. MOOREWOOD, WILLIAM FREDERICK PALMER, Esq., Barrister-at-Law, aged 41.
- 16th. PARHAM, BENJAMIN, Esq., late Judge of the Worcestershire County Courts, aged 69.
- 20th. AUSTEN, BENJAMIN, Esq., Solicitor, aged 72.
- 31st. POCOCK, GEORGE, Esq., Solicitor, aged 45.
- 31st. SEELEY, JOHN, Esq., Solicitor, aged 55.

### *September.*

- 2nd. DOWDING, FREDERICK, Esq., Solicitor.
- 4th. SANDFORD, ERSKINE DOUGLAS, Esq., Advocate, aged 69.
- 4th. PAIN, THOMAS, Esq., late Registrar of the Cinque Ports, aged 84.
- 15th. NAYLOR, ELISHA, Esq., Solicitor, late Assistant Record Keeper of the Inland Revenue Office.
- 19th. ARMSTRONG, ROBERT, Esq., Barrister, aged 50.
- 20th. DONALDSON, WILLIAM LEVERTON, Esq., Solicitor, aged 58.
- 23rd. SKENE, JAMES FRANCIS, Esq., Advocate, aged 29.
- 29th. SMITH, WILLIAM, Esq., Solicitor, aged 53.

### *October.*

- 9th. TALBOT, FREDERIC, Esq., Solicitor, aged 66.
  - 10th. KEYNSHAM, ROBERT LEONARD, Esq., Junr., Solicitor, aged 44.
  - 18th. NORTON, EDMUND, Esq., Solicitor, aged 63.
  - 18th. CARR, GEORGE SWEET, Esq., Barrister.
  - 20th. GLENNIE, JOHN IRVING, Esq., Solicitor, aged 65.
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## List of New Publications.

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**Archbold.**—The Law of Bankruptcy and Insolvency, as founded on the recent Statute. By J. F. Archbold, Esq., Barrister. 12mo, 13s. cloth.

———.—The Statutes 24 and 25 Vict., relating to the Irremovability of Paupers from Unions, to the Passing of Paupers to Scotland and Ireland, and to Vaccination: with Notes. By J. F. Archbold, Esq., Barrister. 12mo, 1s. 6d. sewed.

**Bankruptcy Orders.**—The General Orders made pursuant to the Bankruptcy Act, 1861: with Notes and an Index. 12mo, 2s. sewed.

**Brandon.**—A Treatise upon the Customary Law of Foreign Attachment, and the Practice of the Mayor's Court of the City of London therein; with Forms of Procedure. By W. Brandon, Esq., Barrister. 8vo, cloth.

**Davidson.**—Precedents and Forms in Conveyancing. Second Edition. By C. Davidson, T. C. Wright, and J. Waley, Esqrs., Barristers. Vol. III., in Two Parts, royal 8vo, £2 10s. cloth.

**Davis.**—The New Criminal Law Consolidation Acts, 1861; with an Introduction and Practical Notes; illustrated by a copious reference to Cases decided by the Court of Criminal Appeal. Together with Alphabetical Tables of Offences, as well those punishable upon Summary Conviction as upon Indictment, and including the Offences under the New Bankruptcy Act; so arranged as to present at one view the Particular Offence, the Old or New Statute upon which it is founded, and the Limits of Punishment, and a full Index. By J. E. Davis, Esq., Barrister. 12mo, 10s. cloth.

**Glen.**—Jervis's Acts regulating the Duties of Justices of the Peace out of Sessions. By W. C. Glen, Esq., Barrister. Second Edition. 12mo, 8s. cloth.

**Greaves.**—The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict., with Notes and Observations. By C. S. Greaves, Esq., Barrister. Royal 12mo, 14s. cloth.

**Hazlitt and Roche.**—The Bankruptcy Act, 1861, incorporating so much as remains in force of the Bankrupt Law Consolidation Act, 1849, and of the Bankruptcy Act, 1854. With an Appendix, containing the 7 & 8 Vict. c. 70, the 23 & 24 Vict. c. 33, the 23 & 24 Vict. c. 147; the General Orders under the Bankruptcy Act, 1861; and the General Rules and Orders under the Bankrupt Law Consolidation Act, 1849: with Notes. By W. Hazlitt, Esq., and H. P. Roche, Esq., Barristers. 12mo, 12s. 6d. cloth.

*Jarman.*—A Selection of Precedents, forming a System of Conveyancing : with Dissertations and Practical Notes. Third Edition. Vol. VIII., Part I., "Powers of Attorney." By W. Stokes, Esq., Barrister. Royal 8vo, 8s. boards.

*Lewin.*—A Practical Treatise on the Law of Trusts and Trustees. By T. Lewin, Esq., Barrister. Fourth Edition. Royal 8vo, £1 11s. 6d. cloth.

*Lewis.*—The Bankruptcy Manual : being a Plain Summary of the present Statute Law of Bankruptcy. By C. E. Lewis, Solicitor. 1s. boards.

*Moseley.*—What is Contraband of War, and What is Not? Comprising all the American and English Authorities. By J. Moseley, Esq., Barrister. Post 8vo, 5s. cloth.

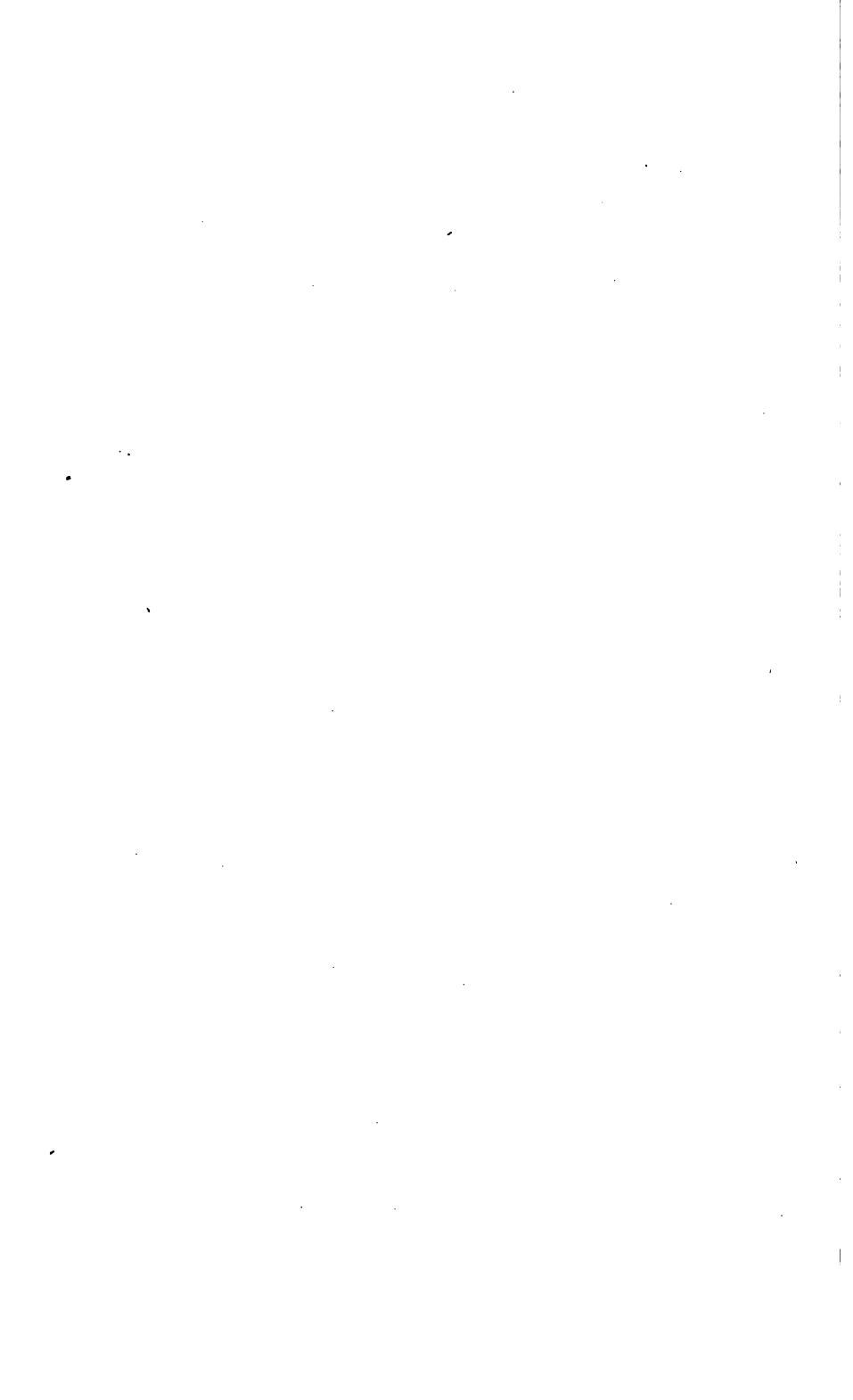
*Oke.*—A Handy Book of the Game and Fishery Laws ; containing all the Acts in force as to Game, Rabbits, Deer, Private and Salmon Fisheries, Dogs, Birds, &c. ; systematically arranged, with useful Forms, Notes, Decisions, &c. By G. C. Oke. Post 8vo, 7s. cloth.

*Paterson.*—The Game Laws of the United Kingdom ; comprising the whole of the Law on the subject : with Introductory Cases, Notes, and Index. By J. Paterson, Esq., Barrister. 12mo, 8s. cloth.

*Paterson.*—The Practical Statutes of the Session, 1861 : with Introductions, Notes, Table of Repealed Statutes, &c., &c. Edited by W. Paterson, Esq., Barrister. 12mo, 12s. 6d. cloth.

*St. Leonards.*—A Practical Treatise of Powers. By Lord St. Leonards. Eighth Edition. Royal 8vo, 35s. cloth.

*Standing Orders.*—Standing Orders of the Lords and Commons, for Session 1862, relative to Private Bills : with Appendix. 12mo, 5s. cloth.



THE  
Law Magazine and Law Review:  
OR,  
QUARTERLY JOURNAL OF JURISPRUDENCE.

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No. XXIV.

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ART. I.—SIR JOHN PATTESON.

**T**HERE is nothing of which Englishmen are more justly proud than of their bench of judges. Though, in some cases, political considerations have had too much weight in determining the selection of these magistrates, still, it must be admitted that Sir Robert Peel, Lord Lyndhurst, Lord Cranworth, and Lord Campbell, practically proved their anxiety to prefer lawyers to politicians. But, at all events, the purity of the bench is in these days beyond suspicion; and difficult as foreigners find it to appreciate the true merit of many of our institutions, none probably are so ignorant as to suspect the honour of a British judge. No man is entirely free from political and social prejudices, and such imperfections must in some degree be exhibited in spite of every caution; but it is no exaggeration to say that the public conduct of those who preside in Westminster Hall is such as to command the respect of the Bar and the confidence of the public. In the Commonwealth on the other side of the Atlantic whose judicial system bears the closest analogy to that of England, not only are the decisions of English tribunals

regarded as almost conclusive precedents, but the judicial conduct of English judges serves as the favourite model at Washington and in many of the States. Long may the English bench maintain the high position which they have acquired! Nor would it be easy to devise many better modes of accomplishing this object than by furnishing authentic memorials of the career of those who, during their lifetime, have proved themselves the ornaments of the English bench.

Of the many eminent men whose loss the country has had lately to deplore, there are few more generally and deservedly regretted than the Right Honourable Sir John Patteson. Though neither a Lord Chancellor nor a Chief Justice, no man of his time was more eminent in his profession, or more universally known and beloved as a private individual. Years have elapsed since Sir John Patteson retired from the seat of justice—more than six months have passed since his career was finally closed; and, although several memoirs of his life have appeared in the journals of the day, it would be ungrateful, and even unjust, to omit all mention of his life in these pages.

Sir John Patteson was born at Coney Weston, on the 11th of February, 1790. He was the second son of the Rev. Henry Patteson, and nephew of John Patteson who for some time represented Norwich in Parliament. From his very earliest years he is said to have been remarkable for weight and steadiness of character, and it was possibly this precision and solidity of mind, or more probably his genial qualities, which obtained for him amongst his playmates the *sobriquet* of "old Patteson." At the early age of seven he was sent to the school of his father's friend and curate, Mr. Merest. Nor is it difficult to realize the bitterness of the trial which, according to one who knew the family well, his mother was said to have felt at parting from her "thoughtful little companion." Mr. Merest was in the habit of taking pupils, and years after he used to recur with pride to his precocious pupil, and to dilate upon the singular union of intelligence,

power of memory, and steadiness of character, which were so remarkably developed even in his childhood. In the year 1800, some three years later, he went to Eton, but it was some years before he obtained a place on the foundation. It was long before the days of railroads, and accordingly young Patteson and his father were obliged to take the road to London in order to reach Eton; and it is an interesting circumstance, that upon that occasion their fellow-travellers inside the coach were young Edward Alderson and his father, who was taking the future Baron of the Exchequer to the Charterhouse. And many a time, no doubt, in after years, as those two eminent lawyers travelled together the Northern Circuit, or sat together on the bench, or at their own firesides, they must have recalled the scene of this their first meeting.

Sir John Patteson's first tutor at Eton was Dr. Goodall, and upon his becoming head master, he became the pupil of the present Primate—whose friend he remained until the close of his life. Though, as has been said by one who knew him well, he had no special taste for poetry and classical learning, his natural power of mind and his untiring industry enabled him to distinguish himself as a scholar, and to earn the honours which the successful pursuit of such studies had to bestow. Indeed, until the very close of his life he continued to cultivate that taste for classical literature which had been created in his schoolboy days: and upon occasions his remarkable memory enabled him to expose the pretension of some ostentatious scholar. Thus, upon circuit, he used to tell how, one day, a witness appeared in the box with a nose of remarkable length. Presently one of the junior barristers wrote down an excellent Greek epigram, which having passed muster with the Bar as an original production, was handed up to the presiding judge, who happened to be Mr. Justice Patteson. Unhappily for the young barrister, the judge had read, not only the epigram in an old collection, but two translations of it into English. He at once wrote down the name of the collection, and both the

translations; and then, to the confusion of the pseudo-author and the amusement of his legal friends, he handed the paper back. Of course the ambitious youth who had been convicted of this sharp practice was bantered not a little, and felt somewhat confused. Recovering himself, however, he presently retorted, "Why, none of you would have detected me had it not been for my Lord upon the Bench." In the well-known case of the *Queen v. Bird*, which was argued before the fifteen judges, and in which there was considerable difference of opinion, Mr. Justice Coleridge and Mr. Justice Patteson, who were senior judges, delivered their judgments amongst the last, and they sat a considerable time in silence expecting their turn. It happened to be the 12th of February, the day after Sir John Patteson's birthday; and it may perhaps be useful to mention that those two eminent men had passed through life in the closest intimacy, and were moreover connected by ties of marriage, Sir John Patteson having married Sir John Coleridge's sister. The latter occupied his enforced leisure by composing and handing to his brother the following verses, which, not only from the circumstances under which they were written, but from their intrinsic merit, deserve to be preserved:—

"Jam per lustra novem, cordi acceptissime nostro,  
 Accipe vota meus quæ tibi mittit amor.  
 Sit tibi par vitæ similisque senecta juventæ,  
 Ortus et egregia spe sine nube cadas—  
 Non alio pueri, juvat hoc meminisse, magistro  
 Lusimus in sylvis, mater Etona, tuis.  
 Nos simulac vitæ duri accipere labores,  
 Nos simulac duri jurgia rauca fori,  
 Fidus amore tuos passus haud passibus æquis  
 Insequor, et tales sat mihi posse sequi.  
 Tandem utinam pariter cedamus in otia tuta,  
 Otia quæ faciat læta superstes amor."

To which Mr. Justice Patteson thus replied:—

"Quæ tu perquam humili nugarum nomine promis,  
 Hæc mihi delicias inter habere libet:

Nec sum adeo illepidus scabrâ rubigine legum  
Ut nequeam versus fingere more meo.  
Cassâ igitur, fateor, verâ sed arundine grates  
Has tibi pro dulci munere, frater, ago."

The Roman satirist commemorates with contempt the voluble Lucilius, who could pour forth two hundred verses in an hour, standing on one foot:—

"Nam fuit hoc vitiosus; in hora sæpe ducentos,  
Ut magnum, versus dictabat stans pede in uno;"

but if he had been able to produce such lines as those of Sir John Coleridge and his brother judge, amidst the distraction of a crowded court, and on the eve of delivering a most important judgment, he would probably have commanded the approbation of the fastidious critic.

Nor was sound scholarship his only accomplishment. Like most Eton boys he had a passionate love of his school and all its pursuits. Here it was that he laid the foundation of those warm friendships which lasted through life. Nor were his contemporaries men of the ordinary stamp. Amongst them he numbered Mr. Justice Coleridge, the Dean of St. Paul's, the Bishop of Lichfield, the Bishop of Winchester, Lord Stratford de Redcliffe, and the present Provost of Eton. In the society of such men his early years were passed, and to his latest hour he maintained with almost all of them the most intimate and affectionate relations. There is no more sterling test of the real worth of a man than the good opinion of his schoolfellows: and it would be difficult to produce an instance in which this test was more thoroughly satisfied than in the case of Sir John Patteson. Into the games and pastimes of the place he entered with characteristic energy. His robust frame and clear eye gave him natural advantages, which he did not fail to cultivate; whilst as a football-player, "at the wall" or in the fives court, or on the river, few could match him for strength and agility. He was one of the best scullers, the best swimmer, and one of the best cricketers of his time. Nor is it an exaggeration to say that even after the



lapse of half a century the memory of his boyish exploits still haunts the old "playing fields" by the banks of the Thames.

From Eton he proceeded to King's College, Cambridge, where Lord Byron's friend Mr. Hodgson, the future Provost of Eton, was his tutor. For that gentleman Sir John Patteson always retained a sincere affection, which during his old tutor's life was fully reciprocated; and the writer of this notice has often heard the late judge relate how he and his tutor, during "a constitutional," devoured the proof-sheets of "*Childe Harold's Pilgrimage*," which the noble author had sent to be perused, or perhaps criticised, by his intimate friend. In those days the scholars of King's still possessed the undesirable privilege of taking a degree without passing any examination, and so were not allowed to enter into competition with the rest of the University; and in his last years the late judge often regretted the existence of the rule which precluded him from measuring his strength with his contemporaries. As it was, the Provost of the college was willing to allow him to waive the college privilege upon the condition that, besides attaining the highest honour in classics, he should also undertake to be Senior Wrangler. The conditions were such as no young man of his good sense and modesty could be expected to accept, but it may be doubted whether he might not have accomplished the Herculean task proposed; indeed, early in his career he did gain what was open to him—an University scholarship, that founded by Dr. Davies, on the first occasion on which it came to be competed for.

Even at that time his kindness of heart and singular good nature were not less prominent than in after years. The following anecdote is worth recording:—On one occasion the tutor, Mr. Hodgson, desired Patteson to tell the other scholars to come to lecture at a particular time. When the scholars were all assembled in hall at dinner, Patteson delivered the message. One of the young gentlemen, however, who, to use a familiar phrase, "was in Coventry," for some reason or other did not choose to hear, and therefore did not attend at the proper time. He was sent for

by the tutor and questioned as to the cause of his absence, when he declared that he knew nothing of the matter—that he had never been told to come. Mr. Patteson's explanation was simple. He said, "Undoubtedly I did not address myself to Mr. — individually, but I made the announcement when all the scholars—Mr. — among others—were present, and I am sure he must have heard me." Upon this the tutor ordered the absentee to make a Latin translation of some portion of Locke on the "Human Understanding." Patteson, with that kind-heartedness which constituted one of the most attractive charms of his character, easily persuaded himself that he was the real cause of the delinquent's punishment, and having sat up all night finished the prescribed translation, and dropped it through the door of his fellow-student. Instead, however, of taking the trouble to copy it out in his own handwriting, Mr. — presented it to Mr. Hodgson in the well-known hand of Patteson, so that the real author was discovered, and his kind intention frustrated. Such conduct recalls the story of his giving the father of a young pickpocket, who had robbed him, five shillings to repair the ragged waistcoat, which the impudent gamin, who saw that the case was about to fail from the absence of a witness, alleged that the judge had torn in attempting to capture him. Nor is it surprising that the man who, in his thoughtless college days, could prove himself so kind-hearted, should in after years, have furnished so many an illustration of the same noble characteristic. Even during his undergraduate days his character for learning and sound judgment was fully established. It was natural enough that his family and friends should appreciate his mental qualities and defer to his judgment; but it is an additional and more striking proof of his merit, that his advice and opinion were eagerly sought and followed, even by his father's friends and neighbours in the country.

Having completed his undergraduate career at Cambridge, and obtained a fellowship at King's College, he was called upon to determine his future course of life. At one time, he

seems to have entertained the idea of taking orders, in the hope of obtaining early preferment. But this idea he soon abandoned, thinking it too worldly. At another time he thought of studying surgery, and, indeed, through life he retained a partiality for that profession. But it was only a passing fancy. He was born to be a lawyer, and, without any serious hesitation, he embraced the study of the law with all the zeal of an enthusiast.

For this purpose he came to London in the year 1813, and at first lived in Southampton Buildings with his elder brother and a friend. Even between husband and wife the reign of peace is seldom quite uninterrupted; on the contrary, the course of true love both before and after marriage is often the smoother for some few breaks and difficulties. But between friends who occupy the same chambers, and between travelling companions, temporary disagreements are almost inevitable. The youthful trio in Southampton Buildings were no exception to the ordinary rule; but then, as in after life, "old Patteson," as he was affectionately called, played the part of peacemaker, and with that good-humoured tact for which he was so remarkable composed all the petty squabbles of lodging-house life—even to the satisfaction of Mrs. Sly, who nevertheless, if history speaks truly, was the most unexact of landladies, and for long enjoyed the substantial favours of Sir John Patteson. In the meantime he had entered the chambers of Godfrey Sykes, one of the most eminent pleaders of his day, whose portrait was honoured by the late judge with a conspicuous place in his gallery of famous lawyers. Subsequently he became the pupil of Joseph Littledale, where he pursued the study of his future profession with determined assiduity and success.

During this period of his career he became engaged to his cousin, Miss Elizabeth Lee. The attachment commenced in childhood; the engagement lasted four years. The prospect was not brilliant, for he had neither wealth nor connexion. In fact, his fellowship was his chief resource; and his father's introduction to some old serjeant, who once asked him to

dinner, but took no further notice of him, was the nearest approach he could make to the dispensers of briefs. But neither his affections nor his ambition were to be baffled, and those who knew him in those days know the noble self-denial which he systematically practised in order to accomplish the object of his most tender aspirations. He married this lady in 1818. It was characteristic of him that he went into Norfolk on a Saturday, was married on Monday, reached town that night, and was in chambers as usual on Tuesday.

Joseph Littledale was among the most eminent pleaders of his day, and in Patteson he found an apt pupil. Supereminently acute and learned, Littledale found every question submitted for his opinion surrounded by a forest of difficulties. His nervous pedantry and passion for minute accuracy rendered him timid and dilatory to a fault. On one occasion, upon returning some papers which had been under his consideration for many months, with the remark that he thought an action might probably be maintained, his client is said to have replied, "The fact is, Sir, that an action has already been brought, and judgment has been recovered." Upon another occasion, in drawing an indictment for murder which had been committed with a double-barrelled pistol, he spent many hours in endeavouring to invent some form of words by which to cover the possibility of the fatal ball having issued from either barrel, and his perplexity was only solved by the application of the common sense of his pupil Patteson, although it is obvious that the difficulty was purely fanciful. Such were the eccentricities of this master of special demurrers, to whom the importance of legal forms had assumed extravagant proportions. Superior to his master, Mr. Justice Patteson, whilst his accurate learning enabled him strictly to adhere to the technical forms of procedure, had the ingenuity and common sense so to use them as to promote the cause of substantial justice. About the year 1816, he opened his chambers as a certificated special pleader. The reputation which he had acquired even in the pupil room of Mr. Littledale was not lost upon the attorneys,

and he soon acquired extensive business; besides which **his** pupil room was thronged by students, many of whom afterwards became eminent in the profession. Amongst these Mr. Justice Crompton, Mr. Justice Vaughan Williams, the late Mr. Baron Watson, Mr. Loftus Wigram, the late T. F. Ellis, the present Recorder of London, and the late Lord Chancellor of Ireland, the Right Hon. J. Napier, were not the least distinguished.

It is a fact worth recording, that amongst his pupils he numbered Mr. Charles Austin, the eminent Parliamentary counsel, whilst one of his own fellow-pupils in the chambers of Godfrey Sykes was his brother, the now celebrated John Austin. One day a singular man entered the pupil room for the first time and presently announced to his companions that he had come there not only to qualify himself as a special pleader, but to study and elucidate the principles of Law. This was John Austin. Not unnaturally the others smiled at his apparent presumption. But as the late Judge used to say, "We were wrong, for he has really done what he proposed"—adding his meed of praise of that masterly work on "*The Province of Jurisprudence.*"

After the short period of five years—in fact, in 1821—he was called to the Bar, and travelled the Northern Circuit. At that time, as one of his most illustrious contemporaries and most intimate friends says, that circuit was pre-eminent not only for its great leaders, but even more for the number and ability of the juniors distinguished as special pleaders. Besides Scarlett and Brougham as leaders, the outer bar was filled by such men as Parke and Alderson. But John Patteson soon found an eminent place among them. There are not very many now who can remember his manner at the bar or his style of argument; but the reports bear ample witness to his acuteness, perspicuity, and profound learning. Simplicity and clearness were the characteristics of his style; and whilst his arguments were entirely free from all false points, they were invariably supported by every authority which could be brought to bear upon them. Probably, the best specimen of his powers as a counsel is to be found in the case of *Ren-*

*nell v. The Bishop of Lincoln*, which he argued before the Queen's Bench in error from the Common Pleas, and, finally, before the House of Lords. The point determined was, that when a prebendary, having an advowson in right of his prebend, dies whilst the church is vacant, his personal representative has the right of presentation for that turn. In the Court below judgment was given against this doctrine, but in the Queen's Bench that judgment was overruled by Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale—Chief Justice Tenterden adopting the view of the Common Pleas. It would be difficult to produce an argument of more cogent power than that addressed to the Court by Mr. Patteson on this occasion—as it is found reported in the 7th volume of *Barnewell and Cresswell*. Mr. Justice Bayley, in the course of his elaborate judgment, says: "I have no difficulty in saying that I came to the argument in this case with a very strong impression on my mind against the plaintiff's right, but the light which was thrown on the subject by the powerful argument of Mr. Patteson, and the authorities to which I have referred, have induced me to think that my first impressions were erroneous." Even Lord Tenterden, who remained unconvinced, was struck by the power of the argument, for at its close Mr. Justice Bayley threw down to the counsel from the bench a note in these terms:—"Dear P., per Tenterden, C. J. An admirable argument; shows him fit to be an early judge." And the Chief Justice was right; for in the year 1830, within three years from that time, Mr. Patteson was raised to the bench by Lord Lyndhurst, at the early age of forty, having been only five years a special pleader, and nine years at the bar. He had, undoubtedly, been one of the Common Law Commissioners, and his promotion, together with that of Mr. Taunton and Mr. Alderson, was the result of the adoption by Parliament of some of the recommendations contained in that Report. But at this period he did not wear a silk gown—he had never led a cause, he had never even addressed a jury. To those who know anything

of the English Bar it is needless to dwell upon the rapidity of such advancement. No one ventured to question the perfect justice of the Chancellor's selection : and it is well known that Lord Lyndhurst has always regarded this appointment with peculiar pride and satisfaction. The promotion of so young a man, would, in ordinary cases, be apt to excite some professional jealousy. But Patteson's brilliant legal reputation and universal popularity disarmed criticism : nor was there any one in Westminster Hall found who did not cordially rejoice that "so good a fellow" had so soon reached a post he was so fitted to adorn.

Looking over the many letters of congratulations which were addressed to the new judge from all quarters by his old schoolfellows and by his professional and private friends, it is no exaggeration to say that even the warm expressions of attachment and of admiration and the confident anticipations of his judicial success which they contain, were more than realized. The very first day on which the newly-appointed judge took his seat at Guildhall, there was a case in which the late Lord Campbell and the late Lord Abinger were engaged against each other. The matter turned entirely upon a point of law, and these two most eminent leaders of the day expressed their desire to settle it by agreeing to adopt the opinion of the presiding judge. Naturally reluctant to undertake so serious a responsibility, he urged them to refer the matter to the full court, but both counsel reiterated their request, and expressed their resolution to abide by his decision. Having read over the statement of facts in order to be assured he had accurately understood them, he at once pronounced his decision, with the correctness of which both parties expressed themselves thoroughly satisfied. But even at that time faint misgivings as to his continued power of hearing seem to have crossed his mind ; for the writer of this notice has a distinct recollection of having heard him declare that unless he had received his appointment about this period of his life, the infirmity, which soon be-

gan to afflict him, would have prevented his accepting it at all.

From the year 1830 to the year 1852 this eminent magistrate continued to discharge the functions of a judge in the Queen's Bench. At first Lord Tenterden was Chief Justice, and Mr. Justice Patteson took his seat beside his old master, Mr. Justice Littledale.

As has been observed, the difference of age and standing between the Chief Justice and the newly-appointed puisne was very great; but the profound learning, the quick apprehension, the sound judgment, and, above all, the imperturbable good temper of the latter, were thoroughly appreciated. Lord Tenterden was succeeded by Lord Denman, and during the whole period of his judicial career Sir John Patteson sat by his side. Though differing from his chief in politics, in character, and in many other respects, they remained for twenty years upon the most intimate and even affectionate terms. Sir John Patteson appreciated at its true value the proud highmindedness of his chief, and heartily sympathized with his love of justice, his scorn for quibbling and chicanery, and his hatred of oppression; whilst Lord Denman thoroughly appreciated the profound knowledge of law and the not less valuable common sense and acuteness which distinguished his brother judge. "It is to the honour of both," as has been said by one who knew them both well, "that while the one had no unworthy jealousy, and was ever ready to receive and to acknowledge the help which was never wanting to him, the other was always unfeignedly anxious to maintain his chief in his right position, and scrupulously avoided any distinction at his expense." Lord Denman was succeeded by Lord Campbell. So accomplished and so experienced a lawyer needed indeed no assistance to enable him to perform the important duties of his high station. But even he, who was certainly one of the most able magistrates who ever sat in Westminster Hall, lost no opportunity of acknowledging his obligations to his brother Patteson. It was Lord Campbell who said of him that "he



never forgot anything ;” and it is but justice to record the fact that he proved the sincerity of his admiration and regard by acts of substantial kindness down to the very period of his own death.

During the twenty-two years which elapsed between 1830 and 1852, there was of course ample means of testing the merit of the judge. No man can administer for so long a period civil and criminal justice in this great country—in London, in Liverpool, in the Guildhall, or at the Old Bailey,—without gaining or losing reputation. The parties interested are too numerous and their condition of life is too various ; whilst the duties of an English judge are almost all discharged in public, and his conduct is constantly watched and jealously criticised by that professional audience of rare discernment which throngs the Bar—nor should it be forgotten that the body of solicitors and solicitors’ clerks, who are constantly brought into practical contact with a judge, are critics whose judgment cannot be neglected. It would be tedious to incumber these pages with quotations from Sir John Patteson’s judgments, in such cases as those of *Stockdale v. Hansard*, O’Connell’s case, Dr. Hampden’s case. His style was admirably clear and succinct ; it reflected the character of his mind ; in truth, he had every quality of a great judge. His readiness and his acuteness were pre-eminent, whilst his singular impartiality was scarcely less conspicuous. He had no difficulty in understanding the most complicated statement of fact, or in following the most subtle train of argument. His memory was such, that no fact, however minute, escaped him. Even in describing the flight of a covey of partridges and accounting for them, or in discussing the details of a game at whist, his characteristic minuteness and perspicuity received constant illustrations ; his powerful judgment refused to be cajoled by any sophistry, however ingenious, and the mere statement of his view seemed to explode the most elaborate fallacy. It is said that the statement of Lord Mansfield was worth another man’s argument ; and the same might have been

said of Mr. Justice Patteson. He had, moreover, a perfect acquaintance with the principles of the law which he had to administer, and with the whole series of cases in which these principles had been established and illustrated. The edition of Saunders' Reports which bears his name and that of Mr. Justice Williams, and which was published about the year 1824, is the best monument of his industry and learning. This work has been long known as the "Pleader's Bible," and the annotations of Mr. Justice Patteson may be regarded not so much in the light of a gloss upon the text, as the completion of the canonical books. Full as these volumes are of cases and references, it is a singular fact, proving the marvellous power of his memory, that unlike most lawyers Sir John Patteson never noted up the new cases as they occurred. Indeed, it would be difficult to find in any book in his law library a single mark either in pencil or in ink. As an illustration of his remarkable memory, the following anecdote is not without interest:—It happened that at a public dinner at which the late Duke of Sussex presided, Mr. Justice Patteson sat on the left hand of the chairman and the Bishop of — on his right; the wine was of peculiar excellence and, *à propos* of its merits, the Duke asked his right reverend friend upon his right in what part of the Bible it was said of wine that it "cheereth both God and man?" The Bishop knowing, probably, that the Duke was not less celebrated for his love of good cheer than for the number and variety of the editions of the Bible in his possession, somewhat timidly suggested that the passage to which His Royal Highness alluded was in the Book of Psalms, where the exact words are, "wine that maketh glad the heart of man." "I have puzzled the bishop!" exclaimed His Royal Highness, with infinite glee; and turning to his left hand neighbour he put the question to him. The Judge, however, with his usual accuracy of recollection, at once replied: "I think that the passage in question will be found in Jotham's parable." "By —!" exclaimed His Royal

Highness, with a strength of asseveration worthy of the quarter deck of other days, "the judge has beaten the bishop." And presently turning to Mr. Justice Patteson, he asked him how he happened to remember the quotation. "Your Royal Highness, no doubt, remembers," said the Judge, with a humorous twinkle, "that the passage is to be found in the Book of—Judges."

Though Sir John Patteson had prepared many indictments against celebrated criminals—and, amongst others, had drawn that in the Cato Street conspiracy—still, whilst at the Bar he had never been much in the criminal court. There is no better test of the moral courage of a judge or of his sterling judicial qualities than the trial of criminals. A weak but conscientious man shrinks from the responsibility of placing the whole case distinctly before the jury, because he is fearful of saying too much or too little; a weak and unconscientious man will condescend to court popular applause by pressing upon the jury the popular opinion; whilst a headstrong man is in danger of assuming too much responsibility, and of attempting to dragoon the jury into what seems to him the just conclusion. But Sir John Patteson avoided both extremes. Whilst his thorough acquaintance with the English criminal law enabled him to appreciate the most subtle technical objections, his love of fair play and his courageous impartiality enabled him to hold the scales of justice and to balance the evidence on either side with even hand. The guilty man would have shunned him; the innocent would have hailed his presence in the judgment-seat with satisfaction. Probably the greatest English jurist now living, who knew Sir John Patteson in his latter years well, has declared that in a long professional career he never saw any man in whom the moral and intellectual qualities which go to form a perfect judge were combined in the same degree. His profound knowledge of law, his quickness of apprehending distinctions, his honest indignation of all trickery, and his anxiety to do substan-

tial justice in spite of forms when they could safely be disregarded, his willingness to consider objections to his opinion, his readiness to surrender it if he thought it was wrong, and his firmness and fearlessness in maintaining it if he thought it was right, made him invaluable to his colleagues on the Bench; whilst towards the Bar his equal courtesy and attention to all, and fear of none, made him as popular with those who addressed him as with those who sat with him.

Such was Mr. Justice Patteson. But unfortunately his career as a judge was destined to a premature close. For many years a growing infirmity had interfered with the discharge of his judicial duties, especially on circuit. With him the pursuit of Law was a passion. He knew the paramount importance of hearing whatever was said in court, yet he distrusted his own judgment to determine the fit moment for his retirement. With characteristic delicacy, therefore, he extorted from one who was on terms of affectionate intimacy a promise to apprise him of the right time when he ought to resign. His friend knew how painful would be the sacrifice, but he kept his promise, and the intimation was thankfully received and after due consideration acted upon. It was not without considerable reluctance that some of his brethren on the Bench would consent to his retirement; and even after his retirement was decided, that most eminent Judge Sir Cresswell Cresswell, with considerate kindness, in order to save Sir John Patteson the necessity of sitting alone, took his place on the Norfolk Circuit whilst Sir John Patteson remained in London. On the 19th of January, 1852, therefore, he addressed the following letter to the Lord Chancellor:—

“MY DEAR LORD,

“I regret to say that the time is come when I feel it to be my duty to tender to Her Most Gracious Majesty my resignation of the office of a Judge of the Court of Queen’s Bench, which I have held since the 12th of November, 1830, and humbly to request that Her Majesty would be graciously pleased to grant me the usual pension.

"I do not take this step merely on account of the length of time, more than twenty years, during which I have been on the Bench, but because the infirmity of deafness, with which, as your Lordship well knows, it has pleased God for many years to afflict me, has now rendered it but too likely that the due administration of justice might be put in peril in my person if I continued in office. Indeed, I fear that it has so already, and that I have too long delayed taking this step: but I assure you that the delay has hardly been my own act, though I have been most anxious not to retire and at my age of sixty-two to burthen the country with a pension, so long as I could properly perform my duty.

"I propose to retire about the middle of next month, when the cases for consideration in the present term will have been disposed of: but if it should appear to your Lordship that it is more convenient that the retirement should be earlier I am quite ready at any time, though with rather a heavy heart, to execute the formal documents.

"I have the honour to be, my dear Lord,

"Yours faithfully,

"JOHN PATTESON."

Lord Truro, who then held the Great Seal, in his reply, expressed his extreme regret at the announcement, declaring that his personal regret was aggravated by the loss of his inestimable services to the public. "No judge," he wrote, "ever carried into retirement a larger portion of the regard of the entire profession than yourself, founded upon the experience of your inflexible integrity, of your impartiality, and upon the admiration of your talent and learning, combined with gratitude for your never-failing urbanity and kindness." The same letter contained the announcement that the Queen had approved of his nomination as a member of the Judicial Committee—"a circumstance," says the Chancellor, "at which I rejoice greatly."

On the 10th of February, 1852, Mr. Justice Patteson took

leave of the Bar. Since the retirement of Sir William Grant from his seat at the Rolls, no such scene had been witnessed. But even that scene, affecting as it is described to have been, was perhaps less touching than the retirement of Mr. Justice Patteson. The Court of Queen's Bench was crowded, the galleries were full to overflowing, all the approaches to the court and the bench itself were thronged with an eager and sympathizing audience. The crowd of barristers who filled the benches rose, and continued standing while Sir Alexander Cockburn, the Attorney-General, who now presides in that Court, having prayed leave to address the retiring Judge, thus addressed him, in a voice and with a dignity well befitting the occasion:—

“Mr. Justice Patteson,” he said, “I am charged by my brethren of the Bar to convey to you our common feeling of regret and sorrow, that we are not again to see you on that bench, on which you have now for two and twenty years occupied a seat with so much honour to yourself, and with such entire satisfaction to the profession and the public.

“As we are, unhappily, about to lose you, it may not be unbecoming in me to offer, or, perhaps, wholly unwelcome in you to receive, the assurance of the universal sense of the entire profession, that the high and sacred duties of the judicial office have never been more faithfully, more honestly, or more ably discharged than they have been by you.

“Though we lose you, your memory will live amongst us, associated with those revered names which this place and presence so naturally recall. It will be cherished by us, not more for that vast and varied learning by which we have all profited, and that great intelligence which we have all admired, than for your untiring love of justice and of truth, your hatred of oppression and wrong, your inflexible integrity of purpose, your singleness of heart, and that benevolence, humanity, and kindness of nature, which leaves us in doubt whether more to revere the judge or to love the man.

“Believe me, you will carry with you into your retirement

the respect, the veneration, and the enduring attachment of the whole body of the profession.

“We rejoice to think that though the sense of one infirmity, and a conscientious apprehension lest it should interfere with the discharge of your important duties, have led to your retirement, you withdraw in the vigour of unimpaired health and unclouded intellect. We hope and pray that in that repose which you have so well and honourably earned, long years of enjoyment and happiness are yet in store for you, and, with full hearts, we bid you, one and all, a respectful and affectionate farewell.”

To this admirable address, delivered with all the grace of an accomplished orator, the retiring Judge read the following reply. It was delivered in a manly tone of unaffected sincerity, which touched every heart. But neither the genius of the place, nor the long habit of judicial composure could quite conceal the pang of so trying a moment. With a voice broken by emotion, he thus began:—

“Mr. Attorney-General and Gentlemen of the Bar,—

“I receive with high and proud satisfaction, and with feelings of the deepest gratitude, the very flattering and kind address which you have just made to me. Of the entire sincerity of what you have said I have not the shadow of a doubt; and though I am painfully conscious that the sentiments which you have expressed as to my conduct on the Bench are far beyond my deserts, yet, making large allowance for your partiality, I will not be guilty of the affectation of supposing that such praise from so discerning and enlightened a body of men as you can be wholly unmerited.

“Mine is one of the many instances which show that a public man without pre-eminent abilities, if he will but exert such as it has pleased God to bestow upon him, honestly and industriously, and without ostentation, is sure to receive a meed of public approbation, fully commensurate with, and generally much beyond, his real merits; and I thank God if I shall be

found not to have fallen entirely short in the use of those talents which He has intrusted to me.

“Gentlemen, it is matter of great regret to me that while I retain most of my bodily and intellectual strength, I feel it my duty to retire from a profession in which I have always taken, and still take, the greatest delight; but the infirmity under which I have long laboured makes it imperative on me to do so. It is not now for the first time that I have contemplated such a necessity, but I have had to avoid, on the one hand, a premature surrender of my office while I had health and strength of body and mind; and on the other hand, a clinging to it when there was danger that my infirmity might put in peril the administration of justice. I have endeavoured, with the kindest advice and assistance, to avoid either extreme, but much fear that I have erred in not retiring sooner. You know that for many years I have used instruments which have greatly assisted my hearing, and without which I must have retired long ago. They are, indeed, a great comfort both in public and in private to any one afflicted with deafness, but they cannot prevent the increase of the infirmity. Of this I am quite sure, that nothing but the increasing kindness of the Bar, and their constant exertions, painful and distressing to themselves at times, together with the ready and affectionate support of my brethren on the Bench, could have enabled me to continue so long.

“I am aware that on some, and I fear too many, occasions I have given way to complaints and impatient expressions towards the Bar and the witnesses in Court, as if they were to blame, when in truth it was my own deficiency, and heartily sorry have I been and am for such want of control over myself. I have striven against its recurrence earnestly, though not always successfully. My brethren on the Bench and you and the public have been very kind and indulgent to me, the grateful recollection of which will remain with and be a great solace to me for the rest of my life.

“And now, gentlemen, I bid you farewell most affectionately.



I wish you all many years of health and happiness, of success and honours in your liberal profession, the duties of which have been, and are, and I trust and believe ever will be, performed not only with the greatest zeal, learning, and ability, but with the highest honour and integrity, and a deep sense of responsibility to God and man; and which being so performed are, in my humble judgment, eminently conducive, under the blessing of God, to maintain the just prerogative of the Crown, and the true rights, liberties, and happiness of the people."

Having concluded, he rose from that seat of justice for the last time; and as he bowed his farewell and retired, the assembled multitude, who stood gazing in respectful silence, not unmingled with audible regret, seemed conscious not only that the country was losing an eminent public servant, but that each of them was himself parting from an old and familiar friend.

Nor was this public demonstration the only tribute paid to Sir John Patteson. Private letters poured in upon him from all quarters, as if men were anxious to assure him that the sentiments expressed by the Attorney-General were a genuine expression of their thoughts. In one letter addressed to him by an intimate acquaintance are these words:—

"Every barrister, junior or senior, must feel that by your retirement he loses a singularly *candid* hearer, always disposed to lend a fair unbiassed ear to an argument or an observation from whatever quarter it might come. Not many are of so happy a temperament as to regard solely *what* is said, and not *who* says it. How often a diffident practitioner will hereafter think of the judge who could conciliate respect without inspiring fear, and will recall the words of Milton:—

"Remember with how just

And *gracious temper* he both heard and judged."

In another letter addressed to him by an old and independent member of the Bar are these words:—

“To speak of your possession, in an eminent degree, of those qualities which are understood to belong to the judicial office, might be trite and common-place; but we have all felt the happy influence of a quality which is possessed by few mortal men. I allude to that perfect command, that invariable sweetness of temper which, united to firmness, has caused you to be so much respected and beloved by us all. In pleading before you, we have felt as though we were addressing a friend who was to set us right in some matter of difference.

“This our gratification has, I know, brought upon you, through us, an additional quantity of labour when you sat in the Bail Court; but I know also that it has been conducive to the satisfactory administration of justice. We have often said to each other ‘Let us take it before Mr. Justice Patteson in the Bail Court, and then every one will be satisfied.’ ”

But perhaps the most touching proof of public respect and affection which he received was from the Common Law clerks of the metropolis who were brought into contact with him at chambers. In the address which they presented to him on the occasion of his retirement, they re-echoed in singularly appropriate terms the general verdict, and in concluding their address they solicited his acceptance of a handsome silver inkstand, as a memorial of their admiration.

On the 2nd of February, 1852, he was sworn of the Privy Council, and became an active member of the Judicial Committee. The comparatively small size of the room in which it sits, the nearness of the members to the counsel, and the advantage of having all the previous ‘proceedings on paper, enabled him for some years to render very important service there. Many of the questions which came before this tribunal were comparatively new to the practitioners at Common Law, but Sir John Patteson was too deeply versed in the principles of Jurisprudence to be puzzled by the difficulties of his task. At the same time it must be remembered, that soon after he took his seat, the Russian war broke out, the

blockade of the Baltic was established, and some very difficult questions arose out of these circumstances. It was nearly forty years since war had ceased, and, with the exception of Dr. Lushington, few survived who could recall the days of Lord Stowell. Moreover, it is to be observed that public sentiment had in the interval undergone considerable change, and the application of the principles of that great jurist needed caution and a nice discrimination. It is well known, as has been truly said, how the character of the Committee was sustained during this period. Lord Kingsdown has deservedly earned for himself a world-wide reputation by the judgments then delivered, and his Lordship has emphatically acknowledged the learning, the sound judgment, and the power of accurately appreciating the facts which he experienced in consulting with Sir John Patteson. However, his infirmity gradually increased, and his general health became impaired by the want of exercise occasioned by lameness; his physicians forbade him any longer to undergo the mental labour which he devoted to this duty, in which he took so much delight. Towards the end, therefore, of 1857 he ceased to attend the sittings of the Judicial Committee.

But his public labours were by no means confined to advising Her Majesty in matters referred to that tribunal. Besides performing the duties of a Commissioner to inquire into the state of the Corporation of the City of London and into Cathedrals, he was eagerly sought by the Government as an arbitrator. In the disputes between the Crown and the Duchy of Cornwall, and between the Post Office and the Great Western Railway, his decision was readily accepted. But the most remarkable transaction in which he was engaged during this period of his career was connected with Cambridge. For many years disputes had been going on between the Town and the University, as to rating and other matters. Length of time had somewhat embittered either side. At length it was proposed to settle the question in dispute by arbitration; although most of those who under-

stood the subject doubted the possibility of finding any one who would accept the office of arbitrator, even if both sides could be brought to an agreement on this important point. However, Sir John Patteson was prevailed upon to undertake the almost impossible task. He investigated the whole matter, made his award, and, marvellous to say, the perfect justice of his judgment was admitted by both sides. An Act of Parliament which is known by the title of "Sir John Patteson's Act" gave permanent effect to his award: and the disputes of many years were not only concluded, but the Town and the University united in presenting the illustrious arbitrator with a splendid tribute of their gratitude.

From the year 1841, Sir John Patteson spent the long vacations at Feniton Court, in Devonshire, and, after his retirement from the Bench, this became his permanent residence. Fond of the sports of the field, his evening rubber, and all the amenities of social life, he thoroughly enjoyed this season of repose; but law was still his ruling passion, and it was his constant delight to discuss with that never-failing crowd of guests—old and young—relations and friends—who assembled round his hospitable board, novel questions of law, and to recall to mind the memory of earlier days, and the "grand" nights of the Northern Circuit. As he was the trusted friend and unfailing counsellor of his contemporaries, he was equally the delight of those much younger in years. The schoolboy, the youth fresh from the college or just called to the bar, found in Sir John Patteson a delightful companion. Nor did the dignity of his position prevent his ample enjoyment of a country merry-making, or the amusements of the ball-room. Even after he became a member of the Privy Council, he lived, during his stay in London, with his son, in King's Bench Walk; and there, whoever has seen him as he sat in his arm-chair, surrounded by a crowd of young men who might have been his children, and who one and all regarded him with a respect and affection almost extravagant, will not readily forget so charming a picture.

There was, indeed, about his character an exquisite simplicity, a downright straightforwardness, a sweetness of temper, and a genuine kindliness, which rose superior to all the cares of life, the passionate pursuit of a laborious profession, and even the physical distress of encroaching disease. His charity was boundless; no human being in distress ever applied to him in vain. No one in difficulty ever sought his advice without receiving the best that could be given under the circumstances. He was the universal peacemaker: and many of the rival claims and angry contests of irritable neighbours and discordant parishes were settled by his judicious interference. The same capacious benevolence which would have led him gladly to straiten himself in order to relieve the wants of others, forbad him to spare his time or his energy if, by any means, he could reconcile those who were at variance.

During the years of his retirement it might be expected that he would employ a large portion of his leisure in reading. He did so, and turned his attention naturally enough to standard works in divinity. At one time he had reason to expect that he might be called on as a member of the Judicial Committee to decide on questions of difficulty very learnedly and hotly agitated. We are assured by one who had full means of knowing, that he went to school as it were with his usual humility on these questions, and did not end without arriving at an unusual amount of well-digested and discriminating knowledge. We have said that he naturally turned to subjects such as these, and with peculiar interest; for, to quote the words of one who knew him well, "he was a thoroughly religious man, without cant or pretence, without superstition. His was in the best sense a reasonable faith, and he had an earnest, without being a passionate, habit of devotion. His religion flowed out into his practice, and gave a completeness to the manner in which he discharged the duties of the squire of the village. His charities were flowing, not indiscriminate; his hospitality was of the best kind, and he was not unreasonably looked up to by all around him, and especially

the poor, as one on whose sound judgment and advice they could never rely too confidently, and on whose kindness in affording succour they could never call too largely."

So Sir John Patteson lived until the spring of last year. A few months before his death his complaints assumed a form which left his medical advisers without hope; and with his usual quickness of apprehension he soon became aware of this circumstance. The conclusion shall be in the words of one of his oldest and most intimate friends, who watched over his last moments with affectionate solicitude. "The discovery did not find him unprepared, nor did it cast him down, although it was not improbable that the disease, in its progress, might occasion very severe pain. He had set his rest on that which never fails the man who leans on it; and although he had no confidence in the merits of a well-spent life, yet it cannot be doubted that the retrospect of such a life contributed to the calmness with which he contemplated his end. Although he was spared acute pain, he had to undergo much distress, but no complaint ever escaped him; he was always cheerful and full of gratitude for all the blessings of life, even for his trial; and he still retained a lively interest in the concerns of all who were dear to him. He died between six and seven on the 28th of June, 1861, without struggle or pain."

His popularity followed him even to the grave. Friday, the 5th of July, was the day of the funeral. It had been intended that it should be strictly private. But his intimate friends and neighbours would not have it so. Notwithstanding the drizzling morning, crowds of people, farmers and labourers, came from all the neighbouring countryside—every one of them clad in decent mourning—to pay the last tribute of respect to this most excellent man. The body, enclosed in a simple oak coffin, was carried across his own lawn to the quiet village church of Feniton by six of the poorest labourers in the parish. The pall was borne by six of the neighbouring country gentlemen:—Sir E. Prideaux, Bart., Sir John Ken-  
naway, Bart., E. Drewe, Esq., Col. Honywood, C. Gordon,

Esq., and J. Sillifant, Esq., whilst the Bishop of Winchester, one of his oldest school friends, insisted upon reading the funeral service. As the mournful procession left the church the gloom brightened: and so amidst the splendours of a summer afternoon and the solemn accents of that most touching service, the body was lowered into the family vault, where now reposes, by the side of his second wife, all that was mortal of the Right Hon. Sir John Patteson.

He had been married twice. His first wife was Miss Elizabeth Lee, by whom he had one daughter. His second wife was the sister of Sir John Coleridge, who bore him three children, one daughter and two sons, of whom the eldest is the recently consecrated Missionary Bishop to the Western Isles of the South Pacific Ocean; the younger, a barrister on the Northern Circuit.

P. C.

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## ART. II.—INTERNATIONAL GENERAL AVERAGE.

THE injurious results that have flowed to commerce from the existing variety of customs of general average have been long felt and acknowledged. Not only do the United States, the various maritime countries of the continent of Europe, and Great Britain, differ from each other both as regards the principles which should be used for determining the relations of a maritime sacrifice to general average, and also as regards the mode in which the value of the interests affected by general average acts should be estimated for the purposes of contribution; but even London sometimes differs in its adjustment of average from Liverpool, and sometimes even from its own general usage. For the purpose of putting an end to these anomalies, a congress of representatives from all the great trading nations was held, as our readers may remember, at Glasgow, during the session of the Social Science Association at that town, in August, 1860. The Congress conducted its deliberations in the Jurisprudence Section, and, under the presidency of Lord Brougham and Lord Neaves,

adopted nine resolutions on the more important of the disputed points in this branch of maritime private law. They then resolved upon having these resolutions embodied in a Parliamentary Bill which should also consolidate the whole law of general average. The Congress considered that a comprehensive and philosophic Bill on this subject would, if it passed the English Legislature, be very likely to be adopted by the Legislatures of the other states represented at the Congress. With a view to this consummation, the Committee did not frame their resolutions upon philosophic principles exclusively, but rather moulded their propositions so as to deviate as little as possible from the usages which appeared to have been generally recognised by the majority of maritime states.

In accordance with the declared wishes of the Congress, a Bill treating of the whole law of general average—defining a general average act, classifying the different species of such acts, enunciating the true principles of estimating the contributory value of the property in its relations to general average, and embodying the substance of the resolutions adopted by the Glasgow Congress—is, we believe, in course of preparation, and will, it is probable, be presented to Parliament in the ensuing Session. We propose in this paper to give our readers an outline of the contemplated changes, chiefly in their relation to the general principles of maritime commercial policy and jurisprudence.

This is a consumer's question, exclusively, and he alone will be affected by an assimilation of the various national rules of this branch of law. Such an amendment of the international code will redound to the general interests of commerce in many ways. The present uncertainty of this department of maritime law operates as a bounty upon remissness on the part of persons in the command of ships at sea, by throwing difficulties in the way of sacrifices being made, or expenditure incurred, by them in certain emergencies. This forced neglect tends, of course, to aggravate the perils incident to maritime



adventure. The same state of things also operates sometimes to induce the captain to make a jettison, instead of some more suitable sacrifice of a part of the ship or her furniture, even though a sacrifice of the latter would be more efficacious, because the former species of maritime sacrifices is the most favoured in the international code of general average. The diversity in the categories of general average acts adopted by the different nations of the world, moreover, operates to occasion deviations from the usual course of the voyage. The captain of a ship, for instance, bound from New Orleans to Dantzic, would, if the vessel sustained a general average loss on its way, prefer putting in at Hamburgh, rather than at Liverpool, the adjustment of the average at the former city being likely to be three times the value of the amount that would be allowed at the latter port. Finally, the uncertainty and confusion at present incident to this branch of law leads to disputes and litigation concerning the adjustment of general average, and, consequently, to additional expense. All these losses and expenses are ultimately paid by the consumer in increased prices of the goods saved. It can be hardly necessary to show that this rise in the price of imported commodities must take place, in order to indemnify the shippers for their general average losses and contributions. The rate of profit is, *cæteris paribus*, the same in all trades and branches of the same trade. If a cargo arrives safely, the shippers realize the usual profits, according to the value of their interest in the cargo. If they lose a portion of their property *in transitu*, it necessarily follows that the remainder of the goods must rise in price; otherwise, the shippers might not only make no profit, but even sustain a loss by the adventure. A maritime speculation is, indeed, often a complete failure, and consequently a loss; and so also an individual shipper may sustain a particular loss for which he is remediless, at least if he is not insured against all contingencies. But such events cannot belong to the normal course of maritime trade, for then capital would flow from

it to the home trade. The prices of foreign commodities would rise, and those in the home trade would fall. This would lead to a rise of profits in the former, and to a fall of profits in the latter department of commerce, until the balance would be settled and the rates of profit in all branches of trade adjusted to an equality. But while the shippers and insurers would thus be indemnified by a rise of profits and a rise in the rate of premium, both being paid out of the increased prices of the foreign commodities, the consumer would have no ulterior source of indemnification, but would himself bear the brunt of the loss. Only a small portion of it would fall on the shippers, considered not as consumers, but as traders. They would, indeed, sustain ultimately a certain falling off in the rate of profit, and so also would inland traders. But this decline of profits would only be in the proportion which the foreign had to the whole trade of the country. Suppose, for example's sake, that foreign trade formed one-half of the entire commerce of a state, and that in the former line profits fell one-half, profits in both the home and foreign branches would ultimately fall one-fourth. The position found in treatises on political economy, that a fall in profits in one particular line is made up by the consumer, must be received subject to the rule we have just stated. We have given a brief summary of the politico-economic relations of this question, which the reader may, if he chooses, further develop for himself. It was, however, hardly necessary for us to qualify our general statement that this is a consumer's question exclusively. The proposition is, indeed, strictly correct, for the rate of profit is not more affected in maritime trade than in any other branch of commerce by a diminished consumption consequent on a rise of prices.

Underwriters have no direct interest in the present question. They will lose at first by a diminution of the number of sea risks (of which the uncertainty of the law as to adjustment of general average is one) which an amended code

of general average would occasion. Risks are what constitute the demand for insurance. By diminishing the number of those, you virtually increase the supply of underwriters, and consequently occasion a temporary diminution of their profits. But certainty in the law of general average will prevent much unnecessary destruction and wasting of property, it will cheapen production, and, by thus promoting consumption, increase the general business of marine insurance. It will consequently redound ultimately to the benefit even of underwriters. But no law on this subject will affect the principles of insurance. It is unimportant to the underwriter whether he discharge a claim under the head of general or of particular average; it is also, in the long run, immaterial to the general public in how many respects the different insurance companies or private underwriters differ from each other in their lists of excepted losses. Such differences will not affect the aggregate profits of these different insurers directly. If the usage at Lloyds' be to except a greater number of losses than those excepted by the public companies, then, as the rate of profit is the same in all trades and branches of the same trade, the former must charge a lower rate of premium than the latter. The equation between the risk and the rate of premium will thus ultimately be completed. Even shipping interests will not be ultimately affected by any change in the law of general average. An increase of the number of recognised general average acts would lower the rate of freight; a diminution of the general average category would, *e converso*, raise the rate of gross freight. The shipper must receive the usual rate of profit in some shape. If he is not fully remunerated by a direct payment, the deficiency must be compensated by an increase in the value of his indirect perquisites. Even shipowners, therefore, will not be ultimately affected by any change in the general average category. However this may be determined, they will at all events gain by a legislation that will render the ascertainment and adjustment of general average acts less difficult than at present. They will also

gain a temporary advantage by any enlargement of the general average category that would be more favourable to them than to shippers, but would not, on the contrary, incur any temporary loss by a measure of the contrary nature. Prices seldom adjust themselves at once, so as to conform precisely to the existing proportion between demand and supply, because capital is sometimes not drawn rapidly to the branch of trade which experiences an improvement. But there can be no doubt that the law of general average can *ultimately* affect consumers only, and that it will not disturb the net rate of commercial or of insurance profits.

If it be asked, then, why should not the principle of *laissez aller* be extended to adjustments of general average, just as it has been applied to so many other commercial departments, where its operation, though negative, has been found most beneficial, the answer is obvious and, we think, satisfactory. A chief function of Government is the removing of uncertainty of the law. The Legislature, whenever it assimilates customs, does not so much enjoin or even recommend a particular form for certain contracts, as it does remove any existing legal impediments that may be in the way of certainty and distinctness in the usual contracting terms. This desideratum is the more necessary in proportion to the importance of the interests and the number of transactions to which the law that is the subject of such reform is likely to apply. The intervention of Government is especially suited to that class of commercial dealings which, as has been observed by the father of economical science, can, by reason of their routine nature, be best managed by public companies. Indeed, the objection proves a great deal too much. It equally applies to a Government standard of weights and measures; for customers would, of their own accord, gradually fall away from the double-dealing merchant, and prefer his more honest rival. But social philosophy, although vindicated in its teaching by verification in practice, is inadequate to indemnify those individuals at whose especial expense the general

rule might possibly be established. Hence, legislation with a view to the equalization of public burdens is requisite in all such cases, both to protect individuals *ad interim* as also to facilitate the vindication of the positive morality of commerce. There are very many cases, therefore, where Government might properly intervene in order to secure a certain degree of uniformity in private contracts. But this prerogative is a matter of duty in respect to customs, which, by reason of the isolation of the various districts in which they prevail, might never be assimilated without such intervention. Our readers know how greatly the genesis of our common law was facilitated by the institution of assize courts. The law of Westminster Hall was thus effectually carried into the most remote districts. On the Continent, on the other hand, an immense variety of local customs, to assimilate which the executive never interfered, prevented the rise of any uniform national common law. We think, however, that much argument on our part in favour of the legislative assimilation of customs of general average would only tend to obscure a proposition that needs no elucidation.

The doctrine of general average is a politic one. It is not intended merely to aid in the adjustment of conflicting claims occasioned by efforts made to avert an unusual accident. It has regard to motives rather than to facts, its main object being to encourage the performance of general average acts upon all necessary occasions. We shall consider it wholly apart from the law and principles of insurance, freight, and marine wages, with which, as we have shown, it has no necessary connexion.

Both the logical and the chronological origin of this commercial usage is to be found in the nature of the peculiar perils incident to maritime adventure. These, prior to the development of the system of insurance, naturally gave rise to an implicit contract of co-operation and of contribution between parties to the same adventure, so far as circumstances seemed to show that such combination was indispensable for the

sake prosecution of the enterprise. This contract or custom was a species of mutual insurance between the parties to it. It was recommended to the adoption of merchants in early times by the very same reasons which induce the shipper of the present day to insure his interest in a maritime adventure. The period within which this contract of mutual insurance was deemed to last was naturally co-extensive with the ultimate major limits of the adventure. A temporary halting at a port of refuge was not considered as furnishing an adequate excuse to a captain or shipper to rescind the implied agreement for co-operation during the voyage. The doctrine, in short, was liberally construed and its consequences could not be evaded by the parties to it at their discretion. A less liberal construction of the rule would have left the necessities of adventure by sea insufficiently provided for. Its object was to vest in the captain and supercargo extraordinary powers, to meet extraordinary contingencies, in order effectually to protect all the interests at risk.

The doctrine of general average appears to be not without a counterpart even on the high stage of political life. It reminds us of the dictatorial authority supposed to be more or less incident in great emergencies to the exercise of sovereign political power, however limited in its ordinary scope: nor can we here omit citing the formula of Roman law, *Durent operum consules ne quid respublice detrimentum caperent*, which, as our readers are aware, worked a suspension of the ordinary privileges of citizenship in order that the governor of the vessel of the State could the more easily direct it when encompassed by unusual perils. Further speculation on the political analogies of this doctrine might lead us to comment on the truism, "*Quāquid detrimenti rex periculatur Animi?*" It is not, however, necessary for us to seek to recommend a due extension of this doctrine by referring to the illustration which the principle on which it is based has found in political systems. Neither need we refer to the natural law of vicarious sacrifice, and its frequent utility and

necessity by reason of the social tie. A more homely, if not more appropriate, phase of the principle which underlies general average is to be found in the power implicitly conferred upon every agent to do all such acts as may be necessary for the successful discharge of the commission assigned him.

This branch of Jurisprudence, even if it be regarded as but faintly shadowed forth in the political world, is at all events replete with interesting associations. It is suggestive of adventure, difficulties, danger, presence of mind, harmony of united resolutions, the romantic, the picturesque, the melodramatic. Our present object, however, will not permit us to dwell, with Lord Byron, on

"The waters of the dark blue sea,"

nor even with the prudent Euripides,\* on the risk of embarking in the same vessel with wicked mariners. In the Institutes of Justinian, indeed, we find the jural idea of a *donatio mortis causâ* illustrated by the quotation of a dialogue from Homer; and we could, doubtless, cite other instances where the poetic element was soothingly invoked by Themis. But we forbear. We live in an age which seeks not so much to neglect the poetic, as it does to cultivate and dignify the practical, by a development of its own peculiar laws. A philosophic mind, however, will not fail to perceive the poetic even in the practical, and to trace in the intricate problems of social philosophy and economic science the same Divine Hand that has overspread the heavens with unnumbered orbs in a harmony so sublime as not to be apparent to a hasty contemplation.

In forming our idea of the essential characteristics of a general average act, the degree of danger necessary to justify such acts is the first point to be considered; and this degree, we think, is arrived at when there is either a probability, an assurance, or a moral certainty of the virtually total loss of ship and cargo. The jeopardy theory, as it is called, which maintains that a moral certainty of total loss cannot give rise to a real

\* Hecuba, 1010.

general average act, is unsound in principle and absurd in itself. It would discourage jettisons being made when most needed, and it implies that the act has not been efficacious. Moreover, the party making a jettison, it is morally certain, loses what was previously at less risk. As he would gain if another's goods were jettisoned instead of his own, it is a necessary consequence that he loses in all cases by the jettison. There is, therefore, a sacrifice made by the owner of goods who casts them overboard, or destroys them, in order to avert a maritime casualty, no matter whether the danger was imminent in the highest, or only in a moderate degree. Indeed, the claim for a general average contribution ought to be more favourably regarded in proportion to the imminence of the peril.

The phrase general average is used in a twofold sense, and signifies either a general average loss or a general average contribution. In English, though not in foreign law, it more usually denotes the contribution, the correlative loss being usually termed a general average act. No practical inconvenience, however, results from this slight verbal ambiguity, because a general average act is seldom mentioned except in connexion with the consequent contribution. A general average has been defined, in *Birkley v. Pesgrave*, 1 East. 220, to be "all loss which arises in consequence of extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo." This definition is substantially correct; we prefer, however, defining general average to be a voluntary and prudent sacrifice or hazard of property or money made to avert unusual danger from all interests staked in a maritime adventure, and not agreed upon in the contract of affreightment. The terms of this definition indicate that several conditions are necessary to be fulfilled before a maritime outlay can be deemed a general average act. There must have been a probability of total loss to the ship and cargo if the contemplated loss were not incurred. The sacrifice must have been a prudent one in the estimation of nautical persons, both as regards the occasion



on which it was made and the degree of expense sustained. The loss must be the foreseen consequence of the act; it must also be one which would not necessarily have been sustained if the act had not been performed, and the peril intended to be averted by it had not supervened; it must have been unavoidable, or, at least, been capable of being commuted only for an equally expensive act; it must not itself have been the cause of the peril; it must have been done to avert an unusual calamity; it must have been intended to benefit both the ship and the cargo; and it must have been followed by a benefit to some of the parties interested in the adventure. We need not dwell further upon the necessary characteristics of a general average act. We may observe, however, that we use the term voluntary, not to denote that the general average acts could have been omitted, due regard being paid to the preservation of the ships and cargo, but merely that the person suffering the loss could with equal efficacy have sacrificed the property of another. Its nature will be best discerned in the concrete, and especially in the striking cases for which the Glasgow Congress intended especially to provide.

The doctrine of general average is, as we have shown, a politic one, devised for the purpose of securing, by the inducements of rewards, the taking of all due precautions for the preservation of property at sea when threatened by unusual peril. It is, therefore, a species of preventive salvage. Whether, then, should the general average category be copious or concise; should it exclude all doubtful cases, or include them; and should it comprise mediate and remote, as well as immediate and direct, losses? The doctrine, as we have stated, is intended to act on motives. Bearing this in mind, we should, we think, arrive at a different conclusion in respect to doubtful sacrifices by the captain, from the opinion we should form as regards similar sacrifices by a shipper or supercargo. Doubtful claims on the part of the captain ought to be included in the general average category, because, otherwise, he will be tempted to omit or unduly postpone the

average act, or commute it for a less efficacious sacrifice, such as jettison or wasting part of the cargo. But *cui bono* to lay down a similarly liberal rule regarding the cargo? The shipper is seldom on board; his will and regard for his own interest need not, therefore, be appealed to. The captain will be sure not to feel an undue regard for the cargo; but he is not free from a like temptation as regards the ship and her furniture. We think, therefore, that but little reflection is needed to show that certain sacrifices of portions of the ship or of her furniture should be allowed in general average while analogous losses to the cargo may be correctly held to fall on the latter only.

From the relation in which the doctrine of general average stands to human motives, it follows, also, that results of a sacrifice are not to be excluded from the general average category merely because they may not be immediate. The rule of marine insurance, *causa proxima non remota spectatur*, is a very salutary one, viewed as a measure of accidental damage, and in its application, as such a measure, between the underwriter and the assured. But it should, if applied at all to cases of general average, be very liberally construed in respect to such, otherwise the policy of the whole doctrine will be infringed upon, and the proper performance of such acts on all necessary occasions discouraged. For example, loss arising from the sale of goods to defray the expenses of repairing a ship in a port of distress has been held to be too remote to affect the underwriter on goods. (*Powell v. Gudgeon*, 5 Maule & Sel. 431.) But such a rule would operate most injuriously as between the shippers. What consequences, then, of a general average act should be considered as being of that nature, and what should, on the other hand, be deemed to be particular average only, it is very hard to determine. The construction of the rule cited is not even yet perhaps perfectly settled. We need not, however, show how the Courts have endeavoured to give it an approximate definiteness; for we consider it, as expounded by the decisions, to be

not sufficiently in accordance with the philosophy of general average. The true principle of discriminating different classes of mediate effects in their relations to the doctrine we are now discussing would appear to be to examine whether these are capable of being foreseen or not. If a result be the foreseen consequence of a general average act, it should, we think, be deemed to be of that nature. If incapable of being anticipated, it should be deemed to be particular average only, at least as between the parties to the adventure. This mode of classifying mediate results of general average acts is the only one that will be found to be in harmony with the spirit of a doctrine which appeals to motives of self-interest, and that will tend to secure the performance of all necessary general average acts.

For most if not all purposes of general average, the adventure, we think, should, as much as possible, be considered as one and indivisible. The successful termination of the voyage being the object intended to be subserved by the doctrine, it, therefore, should regard all acts incident to the navigation only in their relation to that ultimate end. This principle is very important in respect to the contributory value of property affected by a general average act. The end, as Solon observed, is the test of success, and, accordingly, it has been the policy of all maritime states to make the payment of seamen's wages to depend generally on the successful termination of the voyage. The necessary individuality and indivisibility of the adventure is shown by the fact that memorandum articles, even when sold at an intermediate port, are deemed to be the subject of an absolute total loss, if they were at the time of sale in such a state of progressing decay, as that at the end of the adventure they would be wholly worthless. (*Dyson v. Rowcroft*, 3 Bos. and Pull. 474.) The rule in the United States is, that while the thing specifically exists the underwriter is not liable for general average. Such a rule, however, is contrary to all sound commercial policy, for it clearly operates as a bounty on negligence.

The English law, although it does not, as a general rule, aim much at regarding the contract of affreightment as one and indivisible, sometimes, nevertheless, leans to such a view in cases where it is wholly inapplicable. Such an unreasoning adoption of rules, as aids in the solution of practical difficulties, that have only an apparent resemblance to the facts which lead to the formation of the rules, is a common abuse of the generalizing process. These inductions cannot be used for deductive purposes outside the scope of the cases which originally established them. Nevertheless, if a ship be seaworthy on an out and homeward voyage at the time she enters on the outward voyage, she may enter on the homeward voyage in an unseaworthy condition, without discharging the underwriters. The reason assigned for this absurd rule is, that the contract is entire and indivisible, 7 B. and C. 794—a proposition that is entirely false. The contract is divisible, and ought to be apportioned in such cases. The main utility of general rules of commercial law consists in their facilitating the adduction of evidence, and of classifying the case in its proper average category, without inquiring into all the particular minutiae incidental to every casualty. But this reason does not apply to cases which involve an element of uncertainty as to their general character which readily admit of apportionment.

Several of the extraordinary imposts which shipowners have been allowed to lay on merchandise under the head of general average owe their origin, it is to be feared, not so much to a desire on the part of Governments to take proper precautions for the safety of property at sea, as they do to that class of politico-economic doctrines which are now exploded by all economists, but which for so long a period had their exposition in the navigation laws of England. America and other countries have thus, perhaps, in framing their general average codes, endeavoured to encourage their maritime commerce by an indirect protection of shipping interests. A liberal adjustment of general averages in a port also tends to create there an *entrepôt* of commerce. For instance, the

captain of a ship bound from New Orleans to Dantzic would, in case of distress, desire to put in at Amsterdam, because the Amsterdam adjusters are more liberal than those of Liverpool. But the fact of putting in at a port often necessitates a sale of the cargo there. All excess in a general average category, however, is not by any means to be equally deprecated as a defect.

The first resolution which was carried at the Congress, by a majority of 18 to 15, is as follows:—"That, as a general rule, in the case of the stranding of a vessel in the course of her voyage, the loss or damage to ship, cargo, or freight, ought not to be the subject of general average, but without prejudice to such a claim in exceptional cases upon clear proof of special facts." The first objection that we offer to this resolution is suggested by the extreme comprehensiveness of the exception which it embodies. It defines nothing—it declares nothing. It first lays down a general rule, and then subjoins a class of exceptions, equally as numerous, if not more so, than the cases intended to be provided for by the positive part of the proposition. The whole effect of the resolution, if it were enacted into a law, therefore, would be to leave the *onus probandi* upon the captain. But this is the law at the present moment. No captain of a ship can run an old vessel aground any moment he chooses, and then call on an average stater to estimate the amount of his claim upon such portions of the cargo as have not been rendered valueless by the stranding. We altogether object to a resolution the terms of which are so vague. The anomalous construction of the precept thus propounded by some of the most eminent jurists and political economists points out, however, a solid basis for framing a rule that will insure compensation for such cases of voluntary stranding as are fit subjects for a general average contribution, and for distinguishing them from others of an apparently similar nature, but which in reality stand on a wholly different footing in relation to commercial ethics and policy. We have stated that the criterion of a general

average act is its tendency, considered as such, to insure a more exact compliance with his duty on the part of the captain than, in the absence of any positive compensation, he would be likely to exhibit. If we apply this criterion to the question now before us, we shall readily discriminate the cases of voluntary stranding that are fit subjects for compensation from those the performance of which need not be thus specially guaranteed. These two contrasted classes of voluntary stranding will, we think, be found to coincide with the two branches of the proposition which we are now discussing. We hope, however, to enunciate the principle of our classification more distinctly than the ambiguous generality of the resolution of the Glasgow Congress unfolds.

Our readers are familiar with the politico-economic proposition that rent, profit, and wages, although so unlike as to the sources from which they are respectively derived, are nevertheless estimated with strict scientific accuracy by a reference to the quantity of labour which these sources of income can each command. Labour is the measure and common denomination of the value of all commodities, even of those the production of which cost no labour. The universality of the laws of political economy, and the consequently scientific character of that study, is entirely owing to the simple fact, that there is a common denomination and measure of values. If in any other department of knowledge we likewise arrive at any indisputable general truth, we may afterwards use that generalized fact or law as a test of the real nature of apparently similar facts. Such a test may admit of only a limited application, but, as far as it is capable of being applied to the varying correlated facts comprised in the branch of study in which it has been itself evolved by a scientific induction, so far may its results be accepted with the same unwavering confidence that secured its own ready adoption. If, like labour in the science of political economy, or space in mathematics, or number in arithmetic or algebra,

or the rule *de omni et nullo* in logic, it is co-extensive with the whole sphere of the relations of the data which it comprises or to which it may be applied for the purposes of scientific exposition or classification, it raises all the data thus affiliated with itself to its own level. It was thus that the few postulates in the pure sciences we have referred to have achieved their wondrous triumphs in the domain of mind. The exploits of the science of political economy have likewise been owing to the establishment and free use of a common measure of value and price. To apply these observations to the subject in hand, the type of general average acts, as we have observed, unquestionably is jettison. It may be defined in the general terms which we have offered as constituting a definition of a general average act in general, by substituting the words, "throwing overboard," instead of the term "sacrifice." If for every other general average act, a jettison could be substituted at the pleasure of the captain, we could regard the rules relating to general average as constituting a science of a very exact nature. This, indeed, is not the case. A jettison may sometimes be substituted with effect, instead of other sacrifices; upon other occasions, it would be wholly useless, though in these emergencies a sacrifice of a different nature might be sufficient to avert or neutralize the threatened peril. But, although we thus fail to find in the type of general average acts an expression for all the laws of practical conduct that preside over this class of maritime expedients, nevertheless there is no doubt that all those cases of sacrifice for which a jettison may be substituted with equal effect are general average acts. As to other maritime sacrifices, they may or may not be entitled to special compensation according to circumstances; but, if any sacrifice may be fairly commuted for a jettison, it is by reason of such convertibility a general average act. This proposition is, we think, completely established by the foregoing observations. We may, however, offer in corroboration of our theory an additional argument of a practical and, we think, con-

clusive nature. What is there to prevent, we may ask, a captain of a vessel in distress making a jettison, if such be requisite for the safety of the ship and cargo, in all cases where he has an option to make a sacrifice, either of a portion of the cargo or of the ship? Even if a jettison be less efficacious than a sacrifice of a part of the ship or its furniture, is it likely that he would not prefer the interest of the shipowner, his employer, to that of the merchant whom he has perhaps never seen? And how can a passenger of necessarily limited experience prove that the jettison was not the sacrifice which, under the circumstances, ought to have been made? We need not, we think, offer further arguments to prove that every maritime sacrifice for which a jettison might be properly substituted is, *ex necessitate rei*, a general average act.

As there has been in this country no legislative definition or exposition of general average acts, reports and text books are the only authorities which can inform us of the law relating to this subject. There is not, however, strange to say, a single decision upon the question of a voluntary stranding in its relations to general average. Lord Tenterden\* and Mr. Arnould,† the author of a treatise on Marine Insurance, consider that the rule is clearly settled in the affirmative, at least, as regards those cases where the ship is afterwards capable of performing the voyage. It has been decided in the United States, in the case of *Reynolds v. Ocean Insurance Company*, 22 Pick. 191, and in numerous other cases, that a voluntary stranding is a general average act, even though the ship should be immediately afterwards wholly wrecked. It is likely that our Courts, if called upon to determine the question, would follow the principle of these American decisions. There is no reason whatever for distinguishing cases of a total from those of a partial loss of ship, for the precise result of the act could not possibly be

\* Abbot on Shipping, p. 349, 5th ed.

† Arnould on Marine Insurance, vol. ii. p. 898, 2nd ed.



foreseen. The general principle which lies under the whole doctrine of general average—the enforcement of the captain's duty by moral sanctions—is equally applicable to both descriptions of loss. If cases of partial loss of this nature be excluded from the general average category, the captain would, in such a state of the law, be tempted to prefer in all cases a jettison to a voluntary stranding. If it availed not, he would perhaps, after such a wasting of property, be obliged to wreck the ship. But a mere partial loss might have been the only effect of a stranding, if it had been timely made. The present state of opinion on the rules of law relating to a voluntary stranding thus tends to produce confusion in the mind of the captain, at the most inopportune occasions.

There is thus, it appears, not only no ground for the alleged distinction, but every reason, on the contrary, for exploding it, as a mischievous and perplexing anomaly. Our readers are familiar with the ethical distinction drawn between the theory of moral sentiments and the criterion of morality. Conscience takes cognizance of human conduct only in its relation to right or wrong; but, as utility is an inseparable incident to virtuous acts, we sometimes mean to denote their moral aspect by pronouncing them to be useful. The terms good and useful have thus become almost convertible. If we leave out of our account, however, the mental pleasure incident to a virtuous character, we will find many good acts to be followed by much suffering. We cannot, therefore, always infer the nature of the motive from the apparent effect; to do so would be to hold out a bounty upon success alone, and not upon the performance of duty. In the conduct of a maritime adventure, in which much discretion is allowed to the captain, it is necessary to estimate his conduct in its relations to his prudence, and not according to its mere results; otherwise, his interests will be made to depend upon accident, or rather upon his positive misconduct, in making unnecessary jettisons. All the results of a voluntary stranding can in no case be foreseen. Why, then, should there be a different rule applied to cases of total

wreck from that which is used in respect of partial losses? The distinction, indeed, is supposed to be ingrafted upon a leading principle of general average, but it altogether perverts and misinterprets that datum. All unavoidable losses are excluded, as we have mentioned, from general average. When a total wreck is the result of a voluntary stranding, this sacrifice appears to be thus proved to have been unavoidable. If it in reality were so, it ought to be deemed particular average on the ship only; but the evidence is altogether insufficient to demonstrate the pre-existing state of facts. Nevertheless, although it thus led to an inappropriate rule, it was intended to embody a principle which is of the utmost importance—viz., that an unavoidable act deserves no special reward independently of the contract of affreightment.

Mr. Stephens, the author of a very philosophic work on general average, considers that a voluntary stranding should not be deemed a general average loss, chiefly on the ground that the object sought to be attained by such a sacrifice is not the general safety of the whole adventure, but only the safety of the cargo, purchased by the destruction of the ship. An answer to this objection is, that the object of a voluntary stranding is not the destruction of the ship, but the placing of her and the cargo in a situation of less danger. But Mr. Stephens' position assumes too much; for, if its principles were fully carried out, it would obliterate almost the whole category of general average acts; since, in most of such cases of sacrifice, some property is directly or indirectly destroyed or wasted, and no rule has ever been laid down limiting the amount or value of property that may be sacrificed in a general average act. Caudal eliminations are seldom of any value as practical criteria of the correctness of an argument; yet such a test is sometimes of great use in exposing a fallacy that is itself based upon minute distinctions. Suppose, then, that jettisons are made of all the cargo, would Mr. Stephens, we may ask, have contended that the last jettison should not be contributed for, on the ground that it was not made for the safety of the entire

adventure? The like reasoning is equally applicable to the case of a voluntary stranding in respect to the liability of the cargo to contribution for such. Mr. Baily thinks that a voluntary stranding should in all cases be deemed a fit subject for a general average, even though it should have been unavoidable. Mr. Benecke,\* whom we regard as the Ricardo of this branch of economic science, considers that a voluntary stranding has, as a general rule, all the characteristics of a general average loss,—“imminent danger, voluntary determination, and a sacrifice.” If it be unavoidable, however, he does not consider it to be voluntary, or to give to the ship-owner a claim for compensation. We altogether concur with Mr. Benecke in this view of the matter. If the stranding is unavoidable, there is no necessity for remunerating the captain for a public spirit, which is, according to the assumption, not an act of virtue, but a necessity. The reader may now be able to perceive the cause of the distinction between cases of total and of partial loss. Adjusters sought to learn whether the stranding was voluntary or not. To ascertain this, they examined, *à posteriori*, the actual result. If this were a total wreck, they inferred that the stranding was unavoidable and involuntary. We approve of the principle of discrimination thus awkwardly sought to be carried out, but consider the evidence upon which adjusters proceeded to have been insufficient, illogical, and impolitic. The object they proposed, however, was identical with that sought to be attained by the first resolution of the Glasgow Conference, which is still more circuitous in its seeking for evidence as to what is a voluntary stranding. It ought to have distinctly declared that a voluntary stranding which could be commuted for a jettison—as, for instance, for the purpose of evading capture or a lee shore—should be deemed to be a general average act; but that if it be unavoidable, as when it is resorted to in order to prevent the ship from foundering, and could not be commuted for a sacrifice of part of the cargo, it

\* Principles of Indemnity, 219.

ought not to be comprised in the general average category. This resolution applies only to cases of *voluntary* stranding. An accidental stranding has never been considered to be a general average act, because, being accidental, it does not come within the scope of the definition of such an act. The terms of the resolution are not sufficiently distinct on this point. As the practice of several countries of Europe and of the United States has been to admit cases of voluntary stranding in general average, there is thus furnished to us a practical argument in favour of its being comprehended in a code intended to obtain the recognition of all these countries.

If a voluntary stranding were equally injurious to all the interests embarked in the adventure, there would be no great necessity for constituting it a general average act, inasmuch as such a rule would be putting the parties to the expense of an adjustment, which *ex concessis* would leave all parties in the relative condition in which they were before the stranding was made. The want which exists, in our reports, of any decision on the law of voluntary stranding, would appear to indicate that the ship and cargo do not suffer very different degrees of damage. The fact, however, is different. The ship is the property most injured, as a general rule, by the stranding. But, even were it not so, yet it would be impossible to discriminate the damage which the cargo sustained before the stranding from that which was occasioned by that sacrifice, or was subsequent to it. This view is acted upon in the common memorandum, which charges on the underwriter all particular average on the excepted articles, if the ship be stranded, as also in the English rule that, if the cargo warranted free from average be not damaged until after the stranding, the underwriter is nevertheless liable, *Burnett v. Kensington*, 7 T. R. 210. Underwriters, however, may of course adopt any rule they choose, inasmuch as they will charge a rate of premium proportioned to the liberality of their terms. But it would be manifestly inconvenient to charge the shipper of hardware with an injury done to wine or eggs, a connexion with which he never contemplated. It is

also entirely in accordance with the true policy of the doctrine of general average to comprise in its category the injuries done in such cases to the ship, and to exclude from it the injuries done to the cargo. The reasons for showing greater favour to the ship have been already sufficiently explained by us. Even when the ship, freight, and cargo, are all insured against general and particular average, so that the interest of the shipowner and, consequently, of the captain, is unaffected by the comprehensiveness or the narrowness of the general average category, nevertheless, we think that the comprising cases of voluntary stranding in the general average list would be desirable. It would tend to preclude disputes as to whether the average was at all chargeable on the underwriter. The associations would also excite the captain to promptness and vigour. This is a desideratum much more likely to be realized by a certain and comprehensive code of general average than solely by any effect which sudden perils would exercise on the mind of a person inured to maritime adventure, so as to induce him to take the best measures for the welfare of the enterprise wholly irrespective of their effect on the interests of his employer. If the interests at stake be not insured, these arguments are, we think, perfectly conclusive; and provision, of course, should, be made for such cases.

*(To be continued.)*

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### ART III.—ANCIENT IRISH CONVEYANCING.\*

**T**HAT a system of Jurisprudence of a comprehensive nature existed in Ireland long anterior to the arrival of the Anglo-Norman invaders in the twelfth century would appear a matter of so obviously historical certainty, that it

\* The above is the substance of a paper read by Mr. J. Huband Smith, M.A., at the meeting of the National Association for the Promotion of Social Science, held at Dublin in the month of August, 1861.

seems almost unnecessary to offer any detailed proof of it. Nevertheless, the present appears a fitting occasion to recapitulate, however briefly, a few of the evidences that such a system was in operation in this country from a remote period, and that it gradually succumbed before the superior influences which were brought to bear upon it.

As a necessary consequence of the system, and forming co-existent part and parcel of it, there was a body of men who were the depositaries of the legal learning of the period, and by whom the deeds and muniments which the progressive advance of civilization rendered indispensable for the transfer of property were prepared.

A variety of circumstances, flowing from the military and civil occupation of this country by the Northmen, or Scandinavians, in the seventh and eighth centuries, and by the Anglo-Normans in the twelfth, led to the very general destruction of the greater part of the written evidences and conveyances required by the transmission of land and other property; but yet enough has survived the ruinous effects of intestine commotions, and devastating and sanguinary conflicts, to afford a very considerable and important degree of insight into the working of the system of Jurisprudence which, however suited to the times, followed the universal law of all human institutions. Such was the progress of events in other countries of far greater extent, and Ireland could not hope to be exempt from that dispensation which prevails over all the nations of the earth.

It is rather a remarkable circumstance, that among the English who have from time to time settled in this country, men of learning and piety have ever been those who became most ardently attached to the truthful study of her early history. They have ever been foremost in rescuing from the wreck of time all that is valuable and practically useful; to use the expressive words of an eminent writer, *they* became "*ipsis Hibernis Hiberniores.*" It will suffice to mention the names of Sir James Ware, "one of His Majestie's Privie

Council, and Auditor-General of the kingdom of Ireland," Archbishop Ussher, Dr. Narcissus Marsh, Edmund Spenser, Sir John Davies, and Baron Finglas;—to these a host of other names of men of learning, the "*gens togata*" of peaceful professions, might be adduced as examples of this position. From such men and their writings may be drawn the most striking testimonies to the statement so often put forward as to the state of letters and civilization in Ireland during the earlier centuries of our era, before the sacrilegious plunder of the abodes of letters and learning by the Northmen and Scandinavian Vikings, and long anterior to the arrival of the Anglo-Norman invaders in the reign of Henry II.; and though overloaded occasionally by romantic fictions or high-wrought and poetic fancies, yet Truth ever remains and, rising above the superincumbent mass of error, supports and asserts her own supremacy.

Venerable Bede and other Anglo-Saxon writers have been so frequently cited as affording the most conclusive testimony of the amount of piety and learning of which Ireland was the chosen abode at a remote period, and of the eminently great and good men whom she trained in her schools, and sent forth to teach and instruct the warlike and almost intractable tribes of Scotland, England, France, Germany, Switzerland, and Italy, that it seems superfluous to go through a recapitulation of their unequivocal statements.

The following passage from a more recent writer—and it is painful to reflect that it is from the pen of a learned Irishman—discloses a far different aspect of society. Having alluded briefly to the passages in Bede's history, he adds: "Had this venerable historian lived at a later period, he would have seen these boasted gifts of nature trampled under the foot of the hostile invader; instead of a land flowing with milk and honey, he would have described Ireland as an island deluged with blood, and plunged in all the horror of almost continuous civil warfare and confusion. Tranquillity was for ages a stranger in the land, except for these few gloomy

and transient intervals, which, in general, but succeeded some dreadful storms."

But beside the evidences, which being indirect and undesignated, and arising from the concurrent testimony of men of another country, who were induced by the course of events to make this island in some instances their temporary home, but in many others the country of their adoption, and on that very account to be deemed most valuable and important witnesses, we have also preserved to us, most usually by scholars of distinguished attainments, uninfluenced but by the purest motives, and occasionally by others who scarce seem to have been aware of the value of what they have so preserved, some written documents and other tangible evidences which we have still the power of submitting to the severest scrutiny which modern men of learning can institute and subject them to.

Among these are not only inscriptions on many of our most ancient buildings, shrines, and reliquaries, but also some curious and important specimens of early charters, leases, mortgages, bonds, marriage settlements, and other deeds, which afford some most remarkable examples, not only of the skill and legal knowledge of our native conveyancers, but also of the expressive brevity and terseness with which they drew up the agreements, judgments, and other documents, with the preparation of which they were charged. A considerable collection of these latter documents was made, and published, with learned annotations and elucidations, by Mr. James Hardiman, who embodied copies and translations of so many as nine and thirty in a paper, which was read before the Royal Irish Academy, on the 27th of February, 1826; and he took occasion to suggest that many others might be found by careful search in the library of Trinity College and other similar repositories. Of these documents thus published the learned editor informed us that many of them, though not dated, belonged to a period extending from the twelfth to the fifteenth century; the remainder brings us



down to the close of the sixteenth and even the beginning of the seventeenth century. And, though relating chiefly, if not exclusively, to the district anciently known as *Tuath Mumhain*, (pron. Thomond,) or North Munster, the chief part of which was erected into a county by Sir John Perrott, when Lord Deputy in 1585, and thenceforward designated as the county of Clare, yet are, as the editor judiciously observes, most interesting at the present day, as being illustrative of the manners and customs of a remote period. Like as in all collections, some of the documents taken singly might be deemed of little or no value, but combined their utility becomes obvious and unquestionable. This collection brings us down to the period when the laws of England, under James I., were extended over the whole of Ireland, and when the Irish language ceased to be made use of in the preparation of legal documents.

I would now briefly refer to some transcripts of other muniments, an interesting example of which was published by the Irish Archæological Society, and is styled a covenant made between Mageoghegan, Chief of *Kinel Fhiachach*, or Kineleaghe, and the Fox, chief of *Muintir Thadgain*, or as it is anglicized Munterhagan, on the 20th of August, 1526. The original, we are told, is written on a small piece of parchment, in the handwriting, as stated, of James the son of Cairbri O'Kinga, who was present at the making of the covenant, and who committed it to writing two days afterwards. This curious document is accompanied by an interesting prefatory account of the parties, and many valuable notes by the learned Dr. O'Donovan.

Another comparatively recent deed to which I would advert is an agreement in the nature of a mortgage, between Domnhall, son of Lochlain O'Slattery, which was exhibited to the Royal Irish Academy, by its President, the Reverend Dr. Todd, on the 12th of November, 1859. And at the same time he read a translation of it made by Mr. Eugene O'Curry, who is too well known as one of the best Irish

scholars of the present day to need any eulogy here. The observations made by Dr. Todd on that occasion will be found most interesting, but we can only find space for thus much: that this document, which bears the date of 1502, does not appear to have been the original; for the transcriber adds in continuation, (and this clause is evidently in the same handwriting as the remainder of the deed,) "and it was thus I found it in the old charter, in presence of Teige Mac Clanachy, and of Flaithri Mac Flanachy." And then follows, in a different hand of the seventeenth century, and not in the Irish character, the attestation:—"Copia vera examinata cum originali."

To the more ancient of these conveyances and deeds Mr. Hardiman suggested the application of the description given of Saxon instruments of a similar nature by the celebrated English antiquary, Sir Henry Spelman, whom he thus cites:—

"The Saxons in their deeds observed no set forme, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed: as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservation if any were, and the names of the witnesses, which always were many, some for the one part, and some for the other. As for dating, it was not usual amongst them. Seals they used not at all, other than (the common seal of Christianity) the sign of the Cross, which they, and all nations following the Greek and Roman Church, accompted the most solemn and inviolable manner of confirming." The Irish deeds of more recent dates generally come within the description of those commonly in use in the time of Henry III. of England and afterwards, as given by the same author:—"I observe in the deeds of that time a very absolute and methodicall composition which therefore hath ever since been received, and conteynueth in a manner to this day, consisting upon the parts here following:—1. The Direction. 2. The Parties.

3. The Consideration. 4. The words of Grant or donation. 5. The thing granted. 6. The Estate of the Granter. 7. The *habendum*, or estate granted. 8. The use whereto. 9. The Reservation, if any were. 10. The Tenure. 11. The Warranty. 12. The sealing and delivery. 13. The Date. 14. The Witnesses."

I have now to advert to a collection of charters in the Irish language of a much higher antiquity, which is to be found in one of the most precious volumes of early Christian times in Ireland—the MS. of the Gospels, called the Book of Kells. These charters, Dr. O'Donovan suggests, were probably transcribed from the original deeds into this sacred and venerable book in order to secure their preservation. The period at which they were so transcribed into this book may be conjectured from the character of the writing and contractions, which would appear to belong to the latter part of the twelfth century. And the dates of the charters themselves he then fixes, with every appearance of precision, at the close of the eleventh and beginning of the twelfth centuries.

On the amount of learning and research which is displayed in the introduction, the notes, and the observations on these charters I shall offer no comment. In attempting to do so I should fear to fail to do justice to the labours of the editor.

He instances four other extant charters of the same period, all in the Latin language, the first of which is the Charter of the Foundation of the Abbey of Newry, which was printed in its original form in Dr. O'Connor's "*Rerum Hibernicarum Scriptores, 2 Prolegomena ad Annales*," page 158, and taken by him from a MS. in the British Museum, Clarendon, tom. xlv. It is referred to by Sir James Ware in his "*Antiquities*," c. 26, at County of Down, *Newry*, and called a "*Charter of Foundation*." It is entitled "*Charta Abbatiae de Newry*." The precise year of its date cannot be ascertained, but there is sufficient evidence that it must have been about 1160. The interest of this curious historical document will be appreciated from the fact of its being almost the only monastic charter,

previous to the arrival of the English, then discovered, and for the corroboration which it affords of the fidelity of our early annals and genealogical histories, with all which Dr. O'Donovan states that he had carefully compared it. Two other charters were published in the "*Monasticon Anglicanum*," and the fourth was recently printed by the Irish Archæological Society, in the "*Registrum Cænobii Omnium Sanctorum*," edited by the Very Reverend Richard Butler, Dean of Clonmacnoise, from the original MS. in the library of Trinity College, Dublin.

So much time has been occupied by the mere enumeration of the foregoing charters and deeds, that this paper must now draw to a conclusion; yet the obvious practical value and importance of these ancient documents, both to the historian and the legislator, must be obvious to every one of calm and sound judgment.

A few but very striking observations have been made by the learned editor, Dr. O'Donovan, with great truth and justice, on those remarkable charters to which we have last adverted. Time does not permit them to be here quoted at length; they will be found, however, in the volume published by the Irish Archæological Society, to which I have adverted.

But before concluding, it is necessary, for the due appreciation of the muniments to which attention has been directed, that I should observe an important fact which has been adduced by the learned Dean Butler, namely, that down to a late period the amalgamation of the Irish and English law was still incomplete. His authority is of peculiar weight, as no scholar of modern times has proved himself so accurately informed of matters especially connected with the History of the Pale from the beginning of the twelfth century.

He intimates the concurrent existence of the old Irish law with the English law, in the following words:—

"It is not to be supposed, because the Irish had not the benefit of the English law, that therefore they were altogether without the protection of *all* law. The Irish law was ob-

served towards them in the middle of the English. The English settlers brought with them the law of England, but the Irish were governed by the old law of the country. In the 5th Article of the Synod of Cashel, held in 1172, the continuation of the *Irish* law of money compositions for homicide is plainly intimated. In the treaty between Roderick, King of Connaught, and Henry II., in 1175, the Irish tenants who returned to the lands *then* held by the English lords were to pay, at the will of their lords, either the tribute imposed upon Roderick, or the ancient services which they were wont to pay. The Irish Magna Charta of Henry III. was addressed exclusively to the English of Ireland, leaving the Irish Customs untouched. And a petition addressed by the people of Ireland to Edward II. shows that in some cases a distinction in favour of the Irish criminal was made in the King's Courts between an English and an Irish convict so late as 1316." See the King's writ to the Lord Justice, &c., in the appendix to Grace from Rymer's *Fædera*, vol. ii. p. 293. Were other evidence of the fact wanting, it is to be found in the statute entitled "*De Concilio Hibernie*," one of the earliest records of an Irish Parliament, which declares that the slaying of an English and an Irish man requires different modes of punishment, and enacts that an English plaintiff wearing his hair in the Irish fashion is to be answered in court as an Irishman. What these laws were, by whom they were administered, and how long they were observed, in concurrence with English law, are matters which it is to be hoped the labours of the Irish Archæological Society will hereafter elucidate. In Grace's *Annals*, p. 84 n., are some reasons for the wish of Anglo-Irish nobles that the English law should not be granted to their Irish vassals.

But in this important branch of the subject a considerable amount of indirect and undesigned proof, which is on that account to be esteemed the most valuable, is to be found by accurate search among the State papers, letters, and other cotemporary records, statutes of the Anglo-Irish Parliaments,

as well as the valuable MS. collections which from time to time were removed from this country, many, at least, of which are to be found in the Record Office, the Rolls Chapel, the Clarendon MSS. in the British Museum, the Bodleian Library at Oxford, besides the Cottonian and Harleian collections, and the Archbishopal Library at Lambeth, not to mention others in the possession of private individuals.

Thus much must suffice at present, in a brief summary like this, of the sources from which much important information is still to be derived. But it would be wrong to omit here to notice the very important and learned labours of the eminent scholars who have been engaged now for some time under the Commission for the collection, elucidation, and translation of the Brehon laws of Ireland. From them we have much to expect of most important and valuable matter, to aid in future legislation and consolidation of the laws, so as to extend to this country the most essential advantages of the English constitutional enactments, calculated to develop the great resources of this country, which is so universally admitted to be rich, indeed, in industrial resources, many of which are yet but imperfectly known or appreciated. No report has as yet been put forth by which we can estimate the amount of their labours under this recent Commission; but from the high character for learning of the scholars who are engaged under it, anticipations of the highest kind are reasonably to be formed. As to the intense feeling of attachment to the old laws and customs of this country, which existed in the time of James I., there is a most interesting anecdote recorded in a contemporaneous account of one of the Progresses of the highest law officers of the Crown, which has been given to us by one of the most distinguished lawyers of the day, Sir John Davies, the then Attorney-General, in a letter addressed by him to Robert, Earl of Salisbury. The occurrence is there related in the following words:—

“Touching M’Guire’s mensall lands, which were free from all common charges and contributions of the country because

they yielded a large proportion of butter and meal, and other provisions for M'Guyre's table, Albeit the jury and other inhabitants did set forth these mensall lands in certainty, which lying in severall baronies did not in quantity exceed four Ballébetaghs, the greatest thereof being in the possession of one M'Manus and his sept; yet touching the certainty of the duties or provisions yielded unto M'Guyre out of these mensall lands, they referred themselves unto an old parchment roll, which they called an indenture, remaining in the hands of one O'Bristan, a chronicler, and principal Brehon of that country. Whereupon O'Bristan was sent for, who lived not far from the camp, but was so aged and decrepid as he was scarce able to repair to us; when he was come we demanded of him the sight of that ancient roll, wherein as we were informed not only the certainty of M'Guyre's mensall duties did appear, but also the particular rents and other services which were answered to M'Guyre out of every part of the country. The old man seeming to be much troubled with this demand, made answer, that he had such a roll in his keeping before the war, but in that State rebellion it was burned among other of his papers and books by certain English soldiers. We were told by some that were present that this was not true, for they affirmed that they had seen the roll in his hands since the war. Thereupon my Lord Chancellor being then present with us, for he did not accompany my Lord Deputy to Ballishannon, but staid behind in the camp, did minister an oath unto him, and gave him a very serious charge to inform us truly what was become of the roll. The poor old man fetching a deep sigh confessed that he knew where the roll was, but that it was dearer to him than his life; And therefore he would never deliver it out of his hand unless my Lord Chancellor would take the like oath that the roll should be restored to him again. My Lord Chancellor smiling gave him his word and his hand that he should have the roll redelivered unto him, if he would suffer us to take a view and a copy thereof; And thereupon the old Brehon drew

the roll out of his bosom where he did continually bear it about him. It was not very large, but it was written, on both sides, in a fair Irish Character: howbeit some part of the writing was worn and defaced with time and ill keeping: We caused it forthwith to be translated into English, and then we perceived how many vessels of butter, and how many measures of meal and how many porks and other such gross duties did arise unto M'Guyre out of his mensall lands, the particulars whereof I could have expressed, if I had not lost the translated copy of the roll at Dublin. But these trifles are not worthy to be presented to your Lordship's knowledge."

I am restrained by unwillingness to enter on too prolix and extended details, from commenting as fully as otherwise I should do on this narrative, which so touchingly, and with such evident accuracy and truthful minuteness, describes this interview between Sir John Davies and others with this aged Brehon, or chronicler, in the county of Fermanagh, or M'Guyre's country. But as it is mentioned that the "translated copy was soon after lost in Dublin," and the original roll, which, for the sake of English honour and worth, we must conclude was restored as soon as copied to the aged guardian of it, who had exhibited such reluctance to part with what he plainly considered a document of much value, we are left to form the best idea we can of its contents from the narrative of Sir John Davies, which bears upon it the plainest impress of its truthfulness.

It is well worthy of our observation that we fortunately have preserved to us among the collection which I have described made by the late James Hardiman, two very remarkable documents of a similar nature, of whose importance even at the present day, in the elucidation of much that is obscure, I may hereafter take occasion to make some more extended observations of a very practical nature. The first of these is termed *Suim Kiosa Ui Briain*, that is, the sum of what Mr. Hardiman calls "*O'Brien's Rental*." It has no date, but from a passage cited from the Close Rolls of the first year of



Richard II., it would seem that with some certainty this interesting document may be assigned to the middle of the fourteenth century. It will not fail to be noticed, among other important matters disclosed by this document, that the rents, though many were possibly often paid in kind, yet the values are stated in some cases in gold, where they seldom exceed an ounce, and in other cases in silver, where it extends to fourteen ounces and more.

The second of these is headed *Suim Tigernais meic na Mara*, or the sum of the rental of Macnamara. This Mr. Hardiman supposes to be something older than the preceding rental of O'Brien's Country, near Kilrush, in the present county of Limerick.

In this latter rental of the Lordship of Macnamara, there is a remarkable distinction as to the separate reservation of what is called "the Lady's gold," payable to the Bantierghna or Conmara's consort, which Mr. Hardiman was of opinion bore some resemblance to the "Queen gold" belonging to the Queen Consort of England, for a particular account of which he refers us to Pryn's treatise on the subject.

In this rental we have preserved the name of the Brehons or stewards of the Macnamara chiefs, on whose testimony the record was made. This appears to have been Rodan or O'Rodan, and the names of two individuals of that family, Philip and Conor O'Rodan, are preserved, as well as a mention of the family of Lavelle, who were stewards of a portion of Macnamara's estate in the territory of O'Flinn.

From these remarkable documents a further inference may with every appearance of justice be now drawn, that they exhibit truthfully the state of habits and customs of the Irish chieftains of a remote part of the country at the period to which they refer, and also the gradual decline of the administration of the Brehon law as it yielded to the advancing progress of English legislation, and the instructive fact that the Brehons, though administrators of justice, and, as we have seen Sir John Davies styles O'Bristan, chroniclers, yet in

the beginning of the seventeenth century seem to have become little more than collectors of the rents or tributes payable to Irish chieftains.

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ART. IV.—THE RIGHTS, DISABILITIES, AND  
USAGES OF THE ANCIENT ENGLISH  
PEASANTRY.

PART I.—*The Division of Rent into Mail and Gable, and  
the corresponding Arrangement of Customary Tenants.*

MANY lawyers will marvel when they are told that they have no tangible history of rent—no satisfactory description of the old system of agricultural tenancy: they will direct us to Sir Edward Coke, to Chief Baron Gilbert, and other venerable authorities. We revere the names of Coke and Gilbert, but we say with deference that their researches are in some measure defective—that the original theory of rent and the early forms of customary tenancy are only to be drawn from ancient rentals.

The plight of the old English peasantry and the early relations of labour to capital in England are most important subjects of inquiry: we are not able to deal with them properly; we are merely setting down a few notes and fragments—collecting materials for some future interpreter of the Predial Antiquities of England.

The general name for the oblation, or money-payment—now constituting the entire rent, but formerly a subordinate part of it—was gafol, gavel, or landgable. Land at farm was called gafol-land; and a freehold was called ungaveled land, not being subject to rent. The gable appears to have been about a penny an acre, and was but a small part of the price paid for the use of land; the tenants worked out the rest of their rent.

When their labours were light, or not constant, the tenants

naturally paid an increased oblation, which in the rentals of the Kentish Cathedrals\* is distinguished from the gable and called mail or farm—*firma*; the tenants who paid mail are called in Boldon Book mailmen—*malmanni*, or farmers—*firmarii*. In the records of St. Paul's Cathedral† “*werk lond*”—the rent of which was chiefly paid in labour—is opposed to “*mollond*”—the rent of which was chiefly paid in money; the former was called in Latin “*terra operaria*,” the latter “*terra censualis*.” The rentals of the thirteenth and fourteenth centuries often notice a change in the condition of customary tenements, mail-lands being converted into work-lands, or work-lands into mail-lands; and there were lands held subject either to labour or to silver at the lord's discretion.‡

There was a corresponding distribution of customary tenants, divided into tenants who paid the greater part of their rent in labour, and tenants who paid the greater part of their rent in money.

At Boldon, each villein in the year 1183, paid an oblation of thirty pence and some smaller charges for a farm of thirty acres, and worked for the lord three days in the week for forty-eight weeks in the year.

A mail-man, or farmer, at Newton near Boldon, paid five

\* *Freundesberia habet xxi jug' terra de Gaveland unius servitii et unius redditus. Unumquodque jugum reddit x solidos ad quatuor terminos . . . hoc est mal. In media quadregesima xl denarios. Hoc est Gable. Et hec est summa: de unoquoque jugo xiii solid' et iiii denar.*

Pro uno jugo gable xl denarios: De firma ad natale xxx<sup>d</sup> ad pascha xxx<sup>d</sup> ad nativitatem Sancti Johannis xxx<sup>d</sup> ad festum Sancti Michaelis xxx<sup>d</sup>.—(Customale Roffense.)

Apud Monektoun sunt xviii swling' de gauelkende, sexdecim eorum hæc faciunt servitia per annum. De gablo reddent et qualibet acra ob' et de mala de quolibet Suuling xx<sup>s</sup> per annum ad iiii<sup>or</sup> terminos.—(Add. MS. 6159 f. 24 b. Canterbury Rental.)

† Domesday of St. Paul's, lxxv.

‡ Isti tenent tam ad censum quam ad operationem . . . terra ista fuit operaria ad tempus hugonis qui primo posuit eam ad denarios (Dom: S.P. 49) Omnes isti tam operarii quam censarii (51) Inferius notati tenent ad censum . . . (61) Inferius notati sunt operarii (62) dim' virg' quæ fuit operaria modo redd' vi sol iiii<sup>d</sup> (32) xv acras pro xxx<sup>d</sup> . . . et reddit xv ova ad pascha et quondam fuit operaria . . . (71) unam virgatam cujus una medietas fuit ad censum altera operaria (117.)

Aliquando operibus aliquando pro denariis.—(2 Hundred Rolls, 679.)

shillings—a double oblation—for a farm of thirty acres; but was not liable to week-work, he merely ploughed an acre, and sent two men to assist the lord in harvest for four days.\*

In the old Saxon Laws of Landright (*Rectitudines Singularum Personarum*)† the geneatman—or villein, and gebūr—or boor, are distinguished according to the same principle. We need not recite the prolix and obscure detail of their customs and operations; it will be sufficient to say that the services of the geneatman were occasional, and were chiefly confined to the more important acts of husbandry, while the boor was required to work twice or thrice a week for the lord, and to do any kind of labour. It would seem, therefore, that the geneatman—although called villanus in the ancient Latin version of the Laws of Landright—was strictly speaking not a villein, because his works were certainly defined. To constitute pure villenage the service must be uncertain.‡ The boor was a tenant in pure villenage, because he seldom knew beforehand what work he might be called upon to do. He knew not in the evening what would be the service of the morning.

Boors in Domesday are generally called coliberts: they are not often mentioned; hardly more than two hundred are noticed in the whole record; but we do not think it should be inferred that there were but few coliberts or boors in the year 1085. The object of the inquiry undertaken in that year was to ascertain the wealth and annual revenue of the country, not to determine precisely the condition of the tenantry. There was no reason for making a distinction between boors and geneatmen, and it is likely that they were

\* In Boldona sunt xxii villani, quorum unusquisque tenet ii bovāt terre de xxx acris et reddit ii<sup>s</sup> viā de scat penyng et di<sup>s</sup> schaceldr<sup>s</sup> de avena . . . et ii gallinas et x ova et operatur per totum annum tribus diebus in ebdomada.

In Neuton juxta Boldon tenent xii malmanni xxiiii bovāt terre unaquæque de xv acris et redd<sup>t</sup> de singulis ii bovāt v sol<sup>s</sup> de firma et ii gallinas et xx ova et arant et herceant apud Boldon unusquisque i acram et faciunt de singulis ii bovātis iiii precaciones in autumpno.—(Boldon Book.)

† *Rectitudines Singularum Personarum*—edited by Dr. Heinrich Leo. Halle, 1842. Or in Thorpe's *Ancient Laws and Institutes of England*.

‡ Co. Litt. 116 b.

in most cases confounded, and described under the common title of villani—villagers—which became them both.

Coliberts in France were a servile class. Their name seems to denote that they had bent their necks to servitude,\* or that they were obliged to carry burdens. On the other hand, bauer is more or less an honourable designation in Germany; in old glossaries bauer is made equal to colonus,† and coloni were of higher standing than mancipia.

Boor is not yet an obsolete word in English, and geneatman was not out of use at the end of the thirteenth century. The neiatmen or neti upon the lands of Rochester Cathedral at Hedenham and Coddington, in Buckinghamshire, held yardlands or half yardlands at least, and were rather more free than the cotmen. Neiatmen were mailmen, for we are told that the lord could not put them to work without their consent after St. Martin's-day, which began the agricultural year.

We meet with neiatmen again at Barkham, near Wokingham, on lands of Abingdon Abbey. . . . These are the neiatmen of the village, Aldred pays five shillings for half a hyde and ploughs and fallows. . . . Geoffrey the sheriff pays thirty pence for a yardland, and ploughs and fallows and sows half an acre with his own seed and carries corn.‡

In 1279, a customary tenant of Mollond at Castle Camps, in the south-eastern corner of Cambridgeshire, held fifteen acres of land with a messuage for five shillings, and sent two men into the lord's hayfield and to the five autumnal precautions. It is clear that this man's farm was mail-land—censualis—not operaria.

\* "Geatflæd freed for God's sake and for her soul's need . . . all the men who bent their necks for food in the evil days."—(1 Saxons in England, 497.)

† In Hrab: Mauri Gl: p. 957 ist coloni, kapuro, (d. i. Gebaur. 1 Anton Geschichte der deutschen Landwirthschaft, 330.)

‡ Dominus potest ponere ad opera quemcunque voluerit de Netis suis in die Sancti Martini. Et sciendum est quod neti idem sunt quod Neiatmen qui aliquantulum liberiores sunt quam cotmen qui omnes habent virgatas terræ vel dimidias virgatas ad minus. In crastino non ponet eos ad opera sine consensu eorumdem. (Cust: Roff:)

Hi sunt neti de villa. Aldredus de Boueria v solidos pro dimidia hida, et arat et warectat etc. (2 Chron: Mon: de Abingdon, 304, 305.)

At the same place there were several tenants described as Bondi—bondmen. One of them held sixteen acres of land in villenagē. It does not appear that he paid any mail or gable. He returned a goose and a hen worth three pence, twenty eggs worth a halfpenny, and a quarter of oats worth twelve pence. He worked for the lord twice a week from Michaelmas to Pentecost, and thrice a week from Pentecost to Michaelmas, and ploughed nine acres in the year. It is plain that this man was an operative tenant.\*

And so two classes of customary tenants were distinguished as long as the system of predial service endured. The two classes were not always unequal in their personal condition: we have seen that the neiatmen in the Vale of Aylesbury were rather more free than cotmen. In some places there were tenants in ancient demesne, or customary tenants with special privileges: elsewhere the members of both classes were alike unable to give their daughters in marriage, to educate their sons, to sell their colts and bull-calves without the lord's permission. We propose in a future paper to consider the personal disabilities of bondage.

#### ART. V.—THE INNER TEMPLE BENCHERS.—DIS- BARMENT OF EDWIN J. JAMES, Q.C.

THE Disbarring of Mr. Edwin J. James, Q.C., by a "Parliament" of the Inner Temple, would have remained simply chronicled by us among the "Events of the Quarter" if that *ex*-Member of the English Bar had conducted himself, under his humiliation and fall from professional and public life, with natural and becoming submission to the verdict

\* Campos. Custumarii tenentes Mollond. Robertus de Franceis tenet xv acras terre, cum messuagio et reddit per annum v sol' et invenit ii homines ad v precarias autumpui ad fenum levand' et valet ob' . . . .

Bondi. Hugo Ruge tenet xvi acras terre in villenag'. . . (2 Hundred Rolls, 425.)

of society. Indeed, we merely noticed the fact, in our August number, of the Benchers of the Inner Temple Inn having on the 18th of July last, after a protracted inquiry of three months, made an order "*That the call to the Bar of MR. EDWIN JOHN JAMES, Q.C., be vacated; that he be disbarred, and his name struck off the Books of this Society.*" Such order by the forms of the Inns of Court was not final. It had necessarily to be confirmed by "a Parliament;" and which from the eve of the Long Vacation, and the absence of Members of the Bar on Circuit, could not be accomplished till the following Michaelmas Term. Moreover, an appeal lay to the Judges, and Mr. Edwin James had given notice that he should resort to such appellate jurisdiction. Subsequently a "Parliament," held on the 7th November, confirmed the decision of the Benchers; and Mr. James thinking better of his hasty intention did *not* appeal. Nor were these circumstances the only motives for our silence. The failure of Mr. James to obtain protection from his creditors,—under the Statute vulgarly known as the "Gentleman's Act,"\*—unavoidably exiled him from his own country,—Reuter's Telegrams of October afterwards announcing the *ex-Member's* arrival in the United States of America. Now if Mr. James in such expatriation had wisely and humbly set himself down to acquire a Transatlantic new *status* in his profession, and to the acquisition of a better private reputation, we should have been the last journal to have stood in his way. But within the first month of his setting foot in the "New World," besides his arrival being heralded in the American Press as the advent of one of the most eminent leaders of the English Bar and one of Her Majesty's Counsel, he was further proclaimed as a distinguished English visitor of U. S. Spas of autumnal recreation and a frequenter at the receptions of the "White House." This vulgar and

\* 7 & 8 Vict. c. 70.

objectionable notoriety was consummated by an elaborate Memoir in the press of New York of the unknown stranger,—received in England as *autobiographical*, and which “puff direct” was followed by Mr. James’s publication of his *Reminiscences of the Bar* and by other articles bearing his own name in a U. S. sporting newspaper. Public announcements, in eulogistic paragraphs, of his U. S. Citizenship were also published and of his intention of being called to the New York Bar. Afterwards his admission to the Bar of that State was telegraphed home by Reuter! To these rapid announcements succeeded another advertisement in the New York Press, viz., the advertized formation of a partnership in the legal profession of that city. Our readers know that in the U. S. the functions of Barrister and Solicitor are united. One of our Anglo-Saxon Barrister’s succeeding acts was the publication of a legal opinion *gratis*, and *pro bono publico*, on the seizure of the *Trent*. He had the bad taste, besides exhibiting melancholy legal ignorance, to volunteer an opinion against his *native* Country and against the SOVEREIGN under whom, notwithstanding, he still “holds silk.” These several and scandalous acts, of folly and morbid passion for spurious notoriety, of course have brought down upon him the severest castigations of the British Press. Mother country evoked punishment. Even *Punch* satirised this legal Harlequin. In America he has been received as a Political Exile, and he has had a few defenders and some sympathizers at home as really the victim of professional jealousy! It is now, therefore, by Mr. James’s own acts, past and present, due to the Bench, to the Bar, and to the public at home, that our Journal should record the real and true facts antecedent to his Disbarment.

Mr. James was called to the Bar of the Inner Temple on the 30th of January, 1836. Although without the benefit of University education he was some years at a reputable private school. His father, much respected, long held the office of Secondary in the City of London. The son, Edwin, in his



after youth was rather "wild," and like the late Serjeant Wilkins he was for a time by his own calling on the Stage. He had studied elocution, or rather declamation; and he considered Tragedy his natural forte. We believe that *non-success* in the Thespian vocation and the kindness of his parents soon withdrew him from the theatres. Becoming "steadier" he was entered in the Inner Temple. In some respects on his call to the Bar his prospects were propitious. The position of his father was an undoubted advantage to the young advocate, and he had also many connexions among the metropolitan attorneys. Such aids gave him the start of competitors otherwise his superiors; and in confidence and assurance he was not wanting. His bold and jocund manners and his confident mien soon became noticed in the robing rooms of the Four Courts of Westminster and Guildhall; in the course of a very few years he "held briefs" and made motions, and also obtained Sessions and Assize business on the Home Circuit. His cases were miscellaneous, and for some time he partly practised in the Inferior Courts of London; but he never had any reputation as a "Lawyer." His Law was almost always (except that necessarily acquired in Chambers and by attending Courts) "got up" for him. As a Law Officer of the Crown he would have been woefully deficient; and thoroughly unlearned in Civil Law and the Laws of Nations he would have been utterly incompetent for any official station. An "opinion" he would not have scrupled confidently to give. We must however in justice admit that of late years his speeches in Court, to common Juries especially, were marked by talent. In cross-examination he was tolerably prudent, but displaying no sagacity; yet in "flash cases" his addresses were pre-eminent. He understood an ordinary Jury, and by appeals to their ignorance, passions, and prejudices how best to obtain *his* verdicts. But in the half-dozen causes only of remarkable Actions at Law and Criminal Trials in which he led, he displayed no real eloquence or safe judgment—his powers consisting only of unscrupulous

assertion, confident demeanour, and sonorous voice. Discretion was no part of his valour as an Advocate.

Further, we are compelled to mention the general belief of the profession that Mr. James often "angled" for retainers and briefs. A collection of premature announcements of his real and trumpeted retainers culled from the London Press, and of fictitious requisitions to him to become a candidate for vacant seats in the House of Commons, would form an amusing chapter in his *Reminiscences of the Bar*. Thus and early he was "always before the public," while his superiors in real talents and law were sitting solitary in their Chambers or listening unretained on the back benches of the Courts. In the better and highest class of business Mr. James was seldom employed, and by no means successful; meeting not only his equals but his superiors in Law and Advocacy.

We now come to the Benchers' Inquiry, the climax of his public fall,—only premising that Mr. James was elected for the Borough of Marylebone in February, 1859; and that a too frequent speaker in the House of Commons he had no success in that severe ordeal of Parliamentary Oratory, being generally considered a Declaimer and a "failure."

On the 10th day of April last London was surprised by the publication of an address to his constituents, announcing the resignation of his seat; and which act was speedily followed by his retirement from Brooks's and the Reform Clubs. In the meanwhile it became notorious that an execution was in his new house in Berkeley Square, on a Judgment for a large debt. Rumours also, some of course exaggerated, were current throughout all circles in the Metropolis of his irretrievable amount of "indebtedness," and that he must either seek relief in the Bankrupt or Insolvent Courts, or adopt a foreign domicile. He chose at first the latter alternative, removing, we believe, to the Continent, *pro tem.*, some time in the same month. A report was current that these significant acts of "resignation" were compelled by the late Lord Yarborough, consequential on Mr. James's involvement of the

Earl's young son and heir-apparent in the enormous liability of £30,000; and that Mr. James was, "*en gros*," involved in debts exceeding £100,000.

It was impossible that the Benchers of the Inner Temple (and who had unusually but discriminately not elected him to the Bench in 1852, when he received his Patent of Queen's Counsel) could shut their eyes and ears to accumulative reports. Our readers know well the constitutions of the several Inns of Court. The authority of the Societies over members may be questioned, and technically it may be denominated "inquisitorial." The Bar, however, throughout Europe exists only under similar rules of admission and regulations. All the learned professions more or less are subjected to the same conventional institutions and tests. Abuse of power in any of the Societies thus regulating the several professions of "Law, Physic, and Divinity," is of rare occurrence. Barristers of all civilians have the least right to complain of self-elect executives, irresponsible bodies, or of their prerogatives. A young man applies for admission to any Inn of Court; his selection is voluntary. No impediment to membership really exists. A requisition-certificate is simply signed by any two respectable members of the Bar attesting the age, residence, and condition of life of the applicant, with a reference to some reputable person or persons that inquiry may be made into the applicant's character and situation. There are really no other compliances or tests. Admitted and called the new member only submits himself to the rules and customs of his particular Inn. He may change under known regulations to any Inn of Court; his selection and continuance in his original Inn are therefore purely free choice. The powers of the Benchers, of all the Inns, to *disbar* members for personal or professional ill conduct, are well known to every member of the Bar and are by subscription therefore recognised by all. So far from these large and responsible powers being abused we assert that the *latitude* of the Benchers of the Inns, both as to

admission and expulsion, has been of late years the subject of private and public animadversion. The cases of disbarment during the present century are very few; of a *Queen's Counsel* at any period Mr. James is the solitary example of expulsion. We will not rake up the call to the Bar demanded and refused in one case which occasioned a Commons' Select Committee of Inquiry in 1834. That case may or may not have been an instance of just Parliamentary inquiry and the individual inculpated being a member of the Commons; but we know of no refusals of Calls, (excepting a few cases on political grounds and the case of Horne Tooke,) in which admissions to the Bar have been questioned or membership unjustly denied.\* Two or three rejections of claimants to *Bench* membership have been subjects of social discussion. On the whole, we therefore assert that these responsible powers intrusted to the Benchers of all the Inns

\* This memorable refusal of the *call* of Mr. Horne Tooke was the wrong act of the Bench of the Inner Temple. It was based on the false ground of Mr. Tooke having been, and in fact (as the Bench argued) being in *Holy Orders*. Nothing was urged against his character; but it was contended by the Benchers that "once a parson always a parson." Doubtless this was a sham, and a colourable objection, Mr. Tooke's *political* opinions and career being the real motives for his rejection. It is, however, right to mention, that the Bench was nearly divided on the question of the call, the numbers on both sides being equal within one vote,—the call being finally decided in the negative on the casting vote of Mr. Bearcroft, the King's counsel, soon afterwards appointed Chief Justice of Chester. In Mr. Tooke's subsequent great philological work, treating of the "article and interjection," he elucidated his strictures on Mr. Harris's mistakes by alluding to the conduct of the Benchers of this Inn,—“who having first *enticed* me to quit one profession, after many years of expectation, have very handsomely supplied its place to me by the *negation* of the other.” About the same period Arthur Murphy was refused membership in the Middle Temple, because he had been a *comedian*; but he overcame such disqualification (after arresting the Treasurer for his fees) by entering himself in Lincoln's Inn, and being called through the influence of Lord Mansfield. That noble Judge overruled the first cause of refusal as “a frivolous objection.” Nor had the Inner Temple Benchers been always exclusive and conservative. Amongst the portraits in their Hall was formerly one of the notorious Lord Chancellor Jeffries, painted by Kneller in the reign of Charles II. In the succeeding reign the portrait of such a cruel political Judge being considered no credit to the Society, and the picture being the subject of constant jibes, jokes, and indignities, the liberal Benchers, A.D. 1693, made a present of it to the Judge's son, Lord Jeffries. This disbarred portrait was “conveyed” to the family mansion at Acton, near Wrexham, in Derbyshire, and we believe it now abides in the country mansion of the Duke of Portland.

have been rather too charily than harshly exercised. A gentleman called to the Bar has an equal chance with his compeers. He becomes practically a partner in the properties of his Inn. Public opinion and open competition regulate his success and station as a practising Barrister ; his business or ill success in his profession is in no way dependent on the Benchers of his Inn. The Crown can give him precedence or make him a Queen's Counsel when and as the Sovereign (with a responsible Lord Chancellor and Ministry) sees fit. Even refused the *Bench* of his Inn the Crown can notwithstanding elevate him to the judgment seat of any Court in the United Kingdom or Colonies. Nay, the constitutions and privileges of the Inns have been so lately as 1854-5 the subject of a Royal Commission of Inquiry. The Commissioners were the present Lord Chancellor, the Chief Justice of the Court of Queen's Bench, V. C. Wood, and Judges of our Common Law Courts,—a mixed commission including barristers and the late eminent solicitor Mr. Germain Lavie. It is singular that none of the witnesses called or volunteering examination before that Commission made any complaints against the exercise of the above "inquisitorial" powers. Further, the searching and able report of these noble and eminent Commissioners reported on such prerogatives of the Benchers with approval, and as powers indispensable for the protection of the public and the honour of the legal profession. The Commissioners' Report also made public not only the origin, laws, and regulations of the Inns, (voluntarily supplied by their officers,) but also all the Inns returned their entire incomes and expenditures. No public bodies, we unhesitatingly aver, apply their revenues more honestly.

We cannot now avoid a statement of facts, in continuing our narrative, of the lamentable and disreputable liability of Mr. James to the adjudication of the Benchers of the Inner Temple. We believe that there never was an inquiry conducted with more mature consideration, greater patience and fairness, or in which the result was less questioned or

more entirely approved by the Public and the Profession. We therefore proceed to give an epitome of the inquiry, premising only that the Benchers of that Inn comprise the names of some of the most distinguished Judges and Queen's Counsel.

Mr. James's antecedents were patent,—the Benchers more or less having been long personally acquainted with him, with his general professional habits, conduct, and private character. Several of the Benchers were members of both Houses of Parliament, and a few may be designated as once his social friends; some were members of the same Clubs—all of course were his associates for years at the Hall dinners of the Inn. Such a body was a Special Jury, not an Inquisition. Could any gentleman wish for a superior tribunal? And Mr. James might have appealed from its decision (but did not) to thirteen English Judges.\*

We will now briefly state the proceedings of the Benchers. The Press and all London rife with reports of Mr. James's money transactions and professional dishonours, and one written complaint having been communicated to the Benchers, they appointed a Committee of three members of their body, to inquire into the circumstances of Mr. James's Professional conduct in the principal matters in public circulation. The Committee reported grave allegations and imputations against Mr. James. On the report of this Committee Mr. James wrote a letter to the Bench, *volunteering* his anxiety to give the fullest information in his power touching the complaints thus instituted. He therefore did not demur to the jurisdiction; on the contrary, he professed his readiness and solicitude to plead, and to justify.

It is a certain fact at this and subsequent stages of the investigation that the accused had the opportunity of retiring his

\* We in this article scrupulously limit our comments to the charges before the Inn Benchers against Mr. James. But a fourth and most scandalous professional transaction was at the same period published by Colonel Dickson—of Mr. James's conduct to him after the trial of the Colonel's action against the Earl of Wilton. *Vide 4th ed. of the pamphlet of the Colonel.*

name from the books of the Inn. Indeed, the Bench for weeks would probably only have been too glad to have accepted his resignation. It is well known that they have occasionally acted thus leniently; their sole object being simply to purify the Bar, not otherwise to punish the offender. But Mr. James, we presume, preferred the chapter of accidents,—to run the gauntlet, and trusting in the repugnance of gentlemen to give evidence of his dishonourable acts. He had apparently also at this time “composed” the majority of his creditors. In large claims, the latter will usually sacrifice legal and criminal proceedings to the chance of any future dividend. Mr. James’s professional income apparently for some years averaged £7000 *per annum*. Lord Yarborough expecting and seeking not a farthing seems to have been influenced in assenting to Mr. James taking the benefit of the Act by the evil of permanent expatriation or disbarment to smaller and female creditors. His Lordship’s representatives therefore were assenting parties to Mr. James continuing practice; that is to say, for such reason to remit his otherwise just punishment. This course of the noble Earl was honourable; and it was stated before the Benchers to have been advised by Mr. Joseph Parkes and by Mr. Tallents of Newark, his Lordship’s eminent solicitor. Besides the large number of creditors of Mr. James, the second largest debt in evidence was a sum of upwards of £20,000, imposed on a West Country Solicitor. This immense pecuniary “obligation” can hardly be termed a debt. It was perhaps the grossest of all Mr. James’s marvellous impositions; and the creditor’s heavy loss was untainted by usury or any apparent sinister motives in the lender. The several advances forming this heavy gross debt were *bonâ fide* made under the belief, and Mr. James’s solemn assurances, that the borrower had cleared off numerous usurious advances of others; and such new creditor taking an assignment of Mr. James’s entire future professional fees dreamed that in four or five years he should be recouped out of the inexhaustible mine of the Fee Book. It may here be

observed that evidence before the Benchers proved Mr. James not only positively to have denied to Lord Yarborough's advisers the existence of the above £20,000 debt, but that he had also denied to the West Country Solicitor the truth of the report of Lord Worsley's claim! Mr. James doubtless speculated on the secrecy and forbearance of those two heaviest creditors, and having during the inquiry obtained their consents to *pro tem.* protection under the "Gentleman's Act,"—but he reckoned without his host, and with his usual temerity and habitual folly.

After the Report of the Committee (a copy of which with each day's evidence was sent to Mr. James) the Benchers commenced their own inquiry—on the 7th of June, Mr. James returning from the Continent was their first and thus a voluntary witness. His examination, taken in shorthand, occupied an entire evening; commencing at six o'clock, and lasting till near midnight. There was a full attendance of the Benchers, and no ungenerous disposition was displayed in the interrogatories put to him. His own evidence when printed consisted of twenty-one folio pages, exclusive of sixteen other pages of documents and a "Statement" put in by himself. On the Thursday following, June 12th, Mr. James was re-examined; his evidence occupying five other folio pages. It is only necessary to state, that his defence on all the counts was artful, specious, and untruthful. Had he confined his vindication to his written "Statements in Explanation" perused and settled for him (as is reported) by two able members of the Bar, and rested his case on that basis, he might perhaps have defied and bamboozled the Benchers; and he probably might have escaped with a reprimand, not public. But in his infatuation and audacity he rushed on self-destruction. Lord Yarborough's advisers and the West Country Solicitor had till this period declined to attend the Benchers. Mr. James unwittingly on questions of the Benchers (Mr. Roebuck interrogating him) expressed no objection to the examination of those gentlemen "if the Bench



desired it!" In fact, in further answer to the Recorder, Mr. James consented in an evil moment to the Benchers' summons of Mr. Parkes, Mr. Tallents, and the West Country Solicitor. When asked if the Bench might examine the latter, and a damning witness, his insane reply was "I have not the least objection!"

We will now recite the Benchers' continued inquiry, simply observing, as the examinations afterwards demonstrated, that Mr. James's own evidence was a tissue of suppressions, falsehoods, and perversions of fact; and that *his* accounts of the inculpatcd pecuniary transactions no more resembled the after parol and documentary evidence than the moon resembles the sun. The Benchers, thus challenged, requested the attendance of all the gentlemen connected with Mr. James's acts in question. Mr. Joseph Parkes, examined by the Recorder on the 12th of June in the presence of Mr. James, on being summoned, expressly and repeatedly but "respectfully" refused to give any testimony unless distinctly permitted by Mr. James; alleging the same reasons stated by Mr. Tallents in a letter of the latter to the Committee. Mr. Parkes referred to Mr. James for his reconsideration of the consent for examination. Mr. James thereupon recanting his permission the Recorder and Dr. Lushington reminded the accused of his recent assent to the summons of Lord Yarborough's advisers: the Recorder pithily reminding Mr. James that it was strange he should now object, as "I understood you had given us already the account of what passed between you and Mr. Parkes." Mr. James, thus transfixed, answered that if Mr. Parkes chose to be interrogated he should not himself oppose that gentleman's examination. Mr. Parkes distinctly refused such *exonaretur*, repeatedly reminding Mr. James that he should deem himself privileged for Mr. James's sake not to divulge anything except on that gentleman's specific request and full assent. And when Mr. James, again pressed by the Benchers, wavered, Mr. Parkes was still dumb; warning the learned gentleman that if he did on consent submit to

examination he could only give "a brief, full, and entire history of facts." In answer to a succeeding question of the Bench,—whether *Lord Yarborough* had any objection to the examination of his advisers,—Mr. Parkes answered "Certainly not." Mr. James then said, that if it was the *wish* of Lord Yarborough his advisers might be examined, and he himself would not object. Mr. Parkes, evidently not permitting the saddle being put on the wrong horse, answered Mr. James—that the latter, not the noble Earl, must be the consenting party. Ultimately Mr. James, in answer to the Recorder's renewed pressure for consent or dissent, replied, "I would rather withdraw my dissent if Mr. Parkes thinks I ought to do so."

The prompt answer of Mr. Parkes was, "It is not for me to say; I cannot be put into a false position." Mr. James said, "Mr. Parkes's conduct has been most honourable throughout." The Recorder finally asked, "Are we to understand that the statement is to be made with your permission?" The final reply of Mr. James was "*Yes!*" Thus released Mr. Parkes gave his evidence.—It appeared by his testimony, that he had first made known Mr. James to the Yarborough family by retaining him as counsel in 1849 to conduct a contest of the late Mr. Pelham, Lord Yarborough's brother, in a Boston Election. At this point of the examination Mr. James suddenly left the room, the Benchers temporarily suspending the examination. After some delay and a conference they sent by hand a letter to Mr. James stating it as the wish of the Bench that no evidence should be given in his absence; and informing him that the proceedings were suspended until the Bench were informed of his wishes. Nothing could be more considerate or just than the entire proceedings of the Benchers. In a short time the Under Treasurer, Mr. Vaughan, received from Mr. James's Clerk the following note:—

"Tuesday Evening.

"SIR,

"I have seen Mr. James, who desires me to present his compliments to Mr. Russell Gurney, and to say that he feels too unwell to

come out again to-night; but that he has no objection to the proceedings being continued in his absence. Will you be kind enough to bring this message to the notice of Mr. Russell Gurney.

"I am, Sir, your very obedient servant,

"CHARLES BUTLER,

*" Clerk to Mr. James.*

"CHARLES VAUGHAN, ESQ."

The examination of Mr. Parkes was then resumed, that evening being Mr. James's last appearance on the public stage of England; but discontinuing his attendance on the inquiry he thus distinctly in writing consented to its future procedure.

We will now simply give the substance of Mr. Parkes's full and clear evidence. The facts will speak for themselves. They are, summarily,—that Mr. James thus introduced to Lord Yarborough's acquaintance, became intimate with the son; that he first, in September, 1857, Lord Worsley just of age, for his own exclusive benefit and use obtained his Lordship's co-responsibility to loans in Insurance Offices for the gross sum of £4,500 or thereabouts, secured on Life Policies; that some time afterwards in 1858, Lord Yarborough was only informed of his son's involvement, by an anonymous letter; that communication his Lordship enclosed to Mr. James, and the Earl ultimately referring Mr. James to Mr. Tallents, the noble Lord's solicitor. The learned gentleman thus pressed penned the most abject apologies, with solemn promises of an early liquidation of his debt. The correspondence was afterwards put in by Mr. Tallents, and it contained Mr. James's pledge early to relieve Lord Worsley entirely of the whole liabilities. Mr. Parkes stated Mr. Tallents' subsequent discovery of nearly £30,000 of further responsibilities of Lord Worsley for Mr. James! This disclosure of course brought matters to a crisis. Mr. Tallents, under the Earl's instructions, proceeded to fathom Mr. James's debts; and cautiously, unknown to Mr. James, he inquired into the general pecuniary relations of Lord Worsley to such liabilities for the learned friend. Eventually Mr. Tallents communicated with Mr. James in writing, the latter in replies affording not

a syllable or figure of explanation but making abortive attempts for a personal meeting. Mr. Tallents, however, preferring pen and ink intercourse, at last insisted on a reference to Mr. James's solicitor. Nothing satisfactory resulting, and the execution in the meantime entering the Berkeley Square house at the suit of a hostile and *bonâ fide* creditor, Mr. Tallents asked Lord Yarborough's permission to consult some second gentleman, and his Lordship referring him to Mr. Parkes those two gentlemen finally decreed Mr. James to give up his seat in Parliament, to retire from the clubs (Lord Yarborough having introduced him to Brooks's and Lord Worsley being a member,) and Mr. James finally executed a Warrant of Attorney to Lord Worsley for the full debt.

Mr. Parkes put in the following written undertaking of Mr. James. This damning instrument needs no commentary. It is best that Mr. James, in our *résumé* of the evidence, should as far as possible speak for himself:—

“In consequence of pecuniary transactions of Mr. Edwin James, Q.C., and Lord Worsley, the following terms form the only and final conditions which could induce the Earl of Yarborough to withhold from the public a statement of all the facts in relation to his conduct.

“1. That Mr. James immediately gives to Lord Yarborough's solicitor a schedule of his own entire debts and pecuniary liabilities, dated and signed by his own hand.

“2. That Mr. James's professional adviser forthwith prepares a Creditors' trust deed, or Letter of License, and takes immediate steps to ascertain whether all, or in number and amount of claims what proportion, will accept deferred payment not bearing interest, by periodical division of his future income, secured on letter of license or his assignment to trustees (to be hereinafter agreed upon,) no creditor having any preference or any private arrangement or understanding with Mr. James; and that such Trust deed shall contain a covenant by Mr. James against his contraction of any further debt or pecuniary liability.

“3. That if the creditors become parties to such an arrangement and trust deed, Mr. James shall be allowed such a proportion of his future professional income as they may be hereafter agreed upon.

“4. That any and all interests of Mr. James in any life policies of

insurances in connexion with Mr. James's debts to Lord Worsley shall be surrendered or assigned to trustees of Lord Worsley, for his Lordship's sole benefit, if required.

"5. That Lord Yarborough reserves to himself during his own life, and afterwards to his son and surviving advisers, the power, by the disclosure of all the circumstances necessitating such trust deed or letter of license, and the above-mentioned arrangements, to prevent Mr. James's application for, or acceptance of, any Civil, Legal, or other office of Public trust or service.

"6. That the above-mentioned terms and conditions can be agreed to by Lord Yarborough and his advisers solely because the large and serious debts of other Creditors would by present disclosures be wholly sacrificed and lost, and from the fact of Mr. James's future professional labours and gains being also the sole source of any possible dividends, or part repayment, or of any reparation on his part, for the heavy losses of such other creditors; and that he himself is willing to make them all the pecuniary reparation in his power. The foregoing conditions contemplate the renewal by Mr. James of his Parliamentary practice, in addition to that of the Common law, and which appears indispensable to enable Mr. James to reduce his debts.

"7. That Mr. James undertakes, at any time when demanded, to execute a Warrant of Attorney (with entry of judgment) for the entire amount of his pecuniary debts to Lord Worsley, or to trustees on his lordship's behalf, or for any ascertained portion or parts of the gross debt.

"8. That Mr. James abstains from any further communication, direct or indirect, with Lord Worsley.

"Lastly. That Mr. James hereunder signifies his assent in writing to the foregoing terms and conditions, which have been submitted on behalf of the Earl of Yarborough, after Mr. James has voluntarily relinquished his seat in Parliament, the Recordship of Brighton, and his membership of Brooks's Club.

"I hereby assent to the above terms.

"EDWIN JAMES.

"*April 8th, 1861.*"

It appears that at the same time a letter of resignation of the Reform Club was also delivered by Mr. James, to be held and used exclusively on the discretion of Mr. Parkes and Mr. Tallents; and which a few days afterwards was by them sent to that Club. Lord Worsley, it appeared, was a member of

the Club. It may here be observed that Mr. James was proved to have been negotiating a *further* loan (on Lord Worsley's sole responsibility) for an additional sum of £15,000 promised by an Insurance Office! It was further in evidence that the securities Lord Worsley had given were prepared on the instruction of Mr. James's own solicitor.

At this period of the inquiry, the Benchers waiting the attendance of Mr. Tallents, the case of *Scully v. Ingram* was partly proceeded with. The scandal of this second impugned transaction of Mr. James may be very briefly given. He had been Counsel for Mr. Scully; and in the interim of a new trial he had borrowed of the opposite party, the defendant, the sum of £1,250 on his own unsecured acceptances! This act *per se* was grossly unprofessional and utterly unjustifiable. It might or might not, however, have influenced Mr. James's conduct of the plaintiff's case on the second trial; and the evidence of Mr. Scully and his Junior Counsel, Mr. C. Milward, was taken and recorded in the Benchers' Minutes detailing this suspicious transaction. Mr. James's simple explanation was, that the Defendant's loan to him was purely "a simple contract debt" with which the Benchers had no concern.

But before we close our notice of this principal accusation against Mr. James's professional conduct, we will give the statement of Mr. Edwin Watkins. That gentleman was not the executor of the late Mr. Ingram, but the acting friend of Mrs. Ingram, the executrix, and who administered the estate of the deceased. Mr. Ingram, it will be recollected, at the time of his shipwreck and death on the American Lakes, was member for Boston, and proprietor of the *Illustrated London News*. Mr. Watkins, applied to by the Committee of the Bench to give information touching this serious allegation in *Scully v. Ingram*, attended the Committee on the 14th of May. He made, in effect, the following statement:—

"I was an intimate friend of the late Mr. Ingram, and am acting for his widow. After his death, I took charge of and examined his papers. He was not a good man of business, and kept his papers in

an irregular condition. Amongst other things, I looked at the contents of a box, in which there were papers of importance—leases, &c.—and amongst them this packet, in an envelope (producing it) marked in Mr. Ingram's handwriting, 'E. James.' I opened it, and this first letter which I read filled me with astonishment:—

“‘ CONFIDENTIAL.

“‘ 63, Pall Mall, Saturday Evening.

“‘ MY DEAR SIR,

“‘ You shall not regret your kindness to me.

“‘ I must make the sum £1,250.

“‘ Please deduct the interest, and send me cheques for £500 for Monday, and £750 for Monday week.

“‘ I will send you the policy on Wednesday.

“‘ Sincerely,

“‘ EDWIN JAMES.’

“I was quite startled. In the same packet were other letters from Mr. James, which I produce. These things set me to inquire. I asked at Mr. Ingram's office, of Mr. Begbie, his cashier, if they could trace any money passing from Mr. Ingram to Mr. James, and they could not. I then went to Mr. ———, who was very intimate with Mr. Ingram, and made the same inquiry of him. Mr. ——— told me that in the interval between the first and second trials of the case of *Scully v. Ingram*, Mr. Ingram came to him and said, in a state of great excitement, 'I must lend Mr. James some money.' Mr. ——— replied that he did not see that he must. Mr. Ingram answered, 'I must—I am so afraid of him—I must do anything he asks, and you must lend him the money for me.'

“I produce various letters which I have subsequently found, from Mr. ——— to Mr. James, with reference to two bills, each of the date of July 30th, 1859, one for £750, the other for £500, accepted by Mr. James, not made payable at any banker's. Having ascertained these facts, I had an interview with Mr. James at the Euston Hotel. My impression of the manner in which Mr. James cross-examined Mr. Ingram at the trial was that it was excessive, but I may not be competent to form an opinion upon that point; but of the effect I am certain, that after it Mr. Ingram was in a state of totally shattered nerves, and utterly broken down. Upon my meeting Mr. James at the Euston Hotel, I said to him, 'It is a singular accident that it was into this very room I with difficulty led poor Mr. Ingram after your cross-examination of him; and I must tell you that if ever a man had a narrow escape of causing another man's suicide, you had it on that occasion.' I then mentioned to him my discovery of the debt, and that it was my duty to ask him for payment. Mr. James ad-

mitted that he had had the money, saying that it was only £1000, that his election expenses had been very considerable, that he was very poor, but would give me two other bills, which he did. I said I must give him my opinion of the transaction ; that as regards the loan it was altogether discreditable ; that he was Mr. Scully's counsel, and it could not bear the daylight that he should be found borrowing money from Mr. Ingram. Mr. James replied that he did not see it in that light, as Mr. Ingram had offered him the money. I replied that I could not think that to be the case.

"Mr. Ingram had told me that Mr. James had spoken to him very kindly advising him to settle the action. The two bills given me by Mr. James have been dishonoured. The date of the two bills given to Mr. ———, July 30, 1859, was after the first and before the second trial."

Mr. James, who of course was furnished with a copy of this statement of Mr. Watkins, offered no substantial contradiction to its contents. In effect, he wished the Benchers to believe that Mr. Ingram, as his friend, *offered*, in conjunction with "three or four other friends," £1000 each for meeting the expenses of the learned gentleman's second return for Marylebone, in May, 1859. Such "offer," he said, had been "communicated" to him ; but he did not inform the Bench of the communicant's name, nor the names of the other friends who he alleged "did assist me by loans which I have since repaid !" We have heard of men rushing to newly-discovered gold diggings, but never before of idiots offering loans to such a notoriously involved man as Mr. James. But this justice we do him,—that in his "Statement of Explanations" of the Ingram transaction, he writes, that he should "ever regret the *indiscretion* of *accepting* the loan," though "there was nothing of a dishonourable character ever intended or thought of on the part of Mr. Ingram or myself, either in its proffer or acceptance."

It may be doubtful whether the Benchers on this disreputable transaction alone would have done more than reprimand the unscrupulous debtor. There were, however, other ample grounds for erasing his name from the Books of the Inn.

To continue our narrative, we will now succinctly state the



evidence of Mr. Tallents, whose examination on the 18th of June followed the above interlude of *Scully v. Ingram*. This witness's testimony and documentary proofs clenched the nails. It is unnecessary to give a long correspondence in 1857 between the late Earl Yarborough and Mr. Tallents with Mr. James; it forms, however, an important element in the history of Mr. James's first use of Lord Worsley. By the last act of that year the learned gentleman thus addressed his Lordship's solicitor:—

“ Pall Mall, Monday Evening,

“ MY DEAR MR. TALLENTS,

“ Dec. 7th, 1857.

“ I beg you will convey to Lord Yarborough my very deep regret that my pecuniary transactions with Lord Worsley should have caused him one moment's uneasiness, and to convey to him my assurance that the amount for payment of which Lord Worsley is security shall be punctually discharged by myself. Lord Yarborough has been so kind a *patron and friend* to me that I am *under deep obligations* to him, and would make any sacrifice rather than occasion him annoyance or discomfort.

“ Believe me, yours faithfully,

“ EDWIN JAMES.”

With this melo-dramatic undertaking and promise Mr. James appears to have rested awhile undisturbed, but to have speedily plotted graver designs against the young nobleman. On the 9th November following Mr. Tallents writes the Q.C. to know if the last year's loans were paid off. Mr. James, on the 15th, replies evasively, in effect that the interest and policy premiums were duly discharged; that he had not yet “returned” the principal, but that “*Lord Worsley was perfectly satisfied on the subject,*” and that Mr. Tallents might “assure Lord Yarborough that he need feel no uneasiness upon the matter.” Then occurs an interval of a year and half before Mr. Tallents, on the 14th August, 1860, (hearing reports of heavy further James' Loans on Lord Worsley's responsibility,) again writes to Mr. James. In that letter he informs him of the ugly rumours which had come to his own and Lord Yarborough's ears. To this refresher and the request for infor-

mation as to any fresh transactions, addressed to the new house in Berkeley Square, the learned M.P. vouchsafed no reply. Perhaps he might have been at the battle of Solfrino; but on his return from the Italian Campaign he appears to have remained still silent. In February of the following year (1861,) Mr. Tallents, having made actual discoveries, again on the 23rd, exhibited by letter new interrogatories to the Queen's Counsel. He demanded a full statement in writing of *every* transaction with Lord Worsley; "or a refusal will be followed by most active steps for your exposure at all hazards." Mr. James, thus pressed, addressed Mr. Tallents a laconic note; asking, as usual, a personal interview. This declined, Mr. James then referred his pursuer to his "confidential adviser," *i. e.* his solicitor, and who it is promised shall "explain" all. It is needless to enter on further details of these disgusting impositions on Lord Worsley. His Lordship was himself willingly examined by the Benchers. He plainly stated that he had believed his earlier obligations on Mr. James's behalf were liquidated by the real borrower, and that some of the later deeds and bonds had been signed by him on the honourable understanding that Mr. James would apply the proceeds to the extinction of the 1857 and later debts. We will not make public other and equally humiliating letters of Mr. James to Mr. Tallents. They were of course fully communicated by Mr. Tallents to the Benchers, and given in evidence. They constitute, so far as this charge, a "confession." We only need add, in conclusion, that Mr. Tallents and Mr. Parkes acted in perfect concert throughout their painful duties; and that the "terms" ultimately signed by Mr. James were jointly approved by the late Lord Yarborough and those two co-advisers of the Earl. The two gentlemen stated to the Bench, that however impelled by the interests of other creditors to allow Mr. James's return to the Bar, they, as members of the legal profession, could not permit Mr. James to remain Recorder of Brighton administering justice and trying criminals. Had they acted otherwise, they would

have incurred public censure, and have grossly compromised their own reputations.\*

We now end with the last and most singular of Mr. James's pecuniary exploits—his extraction from the pockets of a West Country attorney of a sum of £20,000. This creditor witness was examined on the 26th of June last, following the evidence of Lord Worsley. The circumstances of his romantic debt may be shortly narrated. Mr. James, it appeared, formed our creditor's acquaintance not wholly "promiscuously," but they soon really became friends—the debtor having previously been the successful counsel in a cause of the solicitor's own interest. Mr. James seems early in the Long Vacation of 1858 to have fascinated his new acquaintance, and soon to have visited him at his shootings. Soon after Michaelmas Term the Queen's Counsel applied to his new client for a temporary loan of £400,—and which was advanced on a promissory note. This first bill was of course not "taken up," remaining some months unpaid. It may be marvellous but it was nevertheless proved to be true that this creditor, apparently enamoured of his new friend, subsequently further advanced Mr. James some thousand pounds. After awhile the debtor was insured for the obligations. But as interest and premiums became in arrear the creditor agreed to undertake Mr. James's entire financial difficulties—to advance further sums for the benefit of becoming as he thought and was assured

\* On Mr. James's appointment to this Recordership, Mr. Craufurd, the independent member for the Ayr Burghs, in April, 1855, (and also a member of the Inner Temple,) gave notice of a motion in the House of Commons for the appointment of a Select Committee to take into consideration the circumstances under which the learned Recorder had not been elected a Bencher of the Inner Temple in consequence of certain alleged acts of Mr. James at a recent election for the borough of Horsham, and of a Commons' report on the return. This motion came on the 7th of March following. Sir Joshua Walmsley seconding it. (*Hansard's Debates*, vol. cxxxvii., p. 191.). The motion was negatived without a division, and indeed, after a debate, the seconder withdrew his support. Mr. James, of course ministerially vindicated, was "whitewashed" in the House, such personal motions being commonly discouraged and seldom successful. The motion was by an amendment ordered to be erased from the Journals of the House. It has been, however, justified by subsequent disclosures, and some reparation, as it seems to us, is owing to Mr. Craufurd.

the chief or only creditor. In consideration, the ultimate enormous debt (£22,000) was wholly covered by new Life Policies on the debtor, and the creditor appears for the two next years of the Queen's Counsel's practice to have received all fees. Thus matters again went on very swimmingly for some months. In the meanwhile Mr. James became a successful candidate for Marylebone, on the usual extreme hustings pledges. The seat was not unwisely considered a pretty sure road to the office of Solicitor-General,—perhaps a stepping-stone to even the Great Seal! On the same scheme of advance in professional life the country solicitor admitted to the Benchers that he had recommended and taken for Mr. James the hotel in Berkeley Square!

We will only add that before the conclusion of the inquiry Mr. James had sent in the following letter of resignation of his membership:—

“Temple, June 18th, 1861.

“GENTLEMEN,

“The very painful position in which I feel myself placed, and not intending to resume practice at the Bar of England or that of the Colonies, I beg to be allowed to retire my name from the honourable Society of the Inner Temple. I trust I shall be allowed to adopt this step, and thus to terminate an investigation almost as painful to the Bench as to myself, &c.

“EDWIN JAMES.”

This proffered resignation was of course too late and could not be accepted. The time for such a retreat was on Mr. James's receipt of a copy of the Committee's Report, or on the conclusion of his own examination. After his assent to the summons of the witnesses subsequently examined it was clearly due to them and to the public that the inquiry should continue until its natural conclusion. We have been thus circumstantial because we have deemed it due to the entire profession and the public that publicity should now be made of the principal facts of Mr. James's unfortunate disbarment. We have stated that it is the first precedent of the disbarment of any Queen's Counsel; but we believe that he still retains

his Royal Patent uncanceled! The Benchers of the Inner Temple can need no vindication. They have discharged and done their proper part in this lamentable matter, and their final act alone could have maintained the "HONOUR OF THE LAW."

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#### ART. VI.—SUGDEN ON POWERS.

*A Practical Treatise of Powers.* By EDWARD SUGDEN, (now Lord St. Leonards.) The Eighth Edition. London: H. Sweet. Dublin: Hodges, Smith, & Co. Pp. 1000.

WE hail with great pleasure the appearance of a new edition of Sugden on Powers, both on account of the intrinsic merits of that celebrated work, and the position it has so long maintained in the estimation of the profession, as also on account of the gratification which the issue of any formal treatise from the pen of its noble and learned author, already full of years and honours, will not fail to impart to the legal public. The present edition, unlike its later predecessors, consists of a single volume instead of two, but it has not been by the change deprived of any portion of its effective strength.

The first edition of Sugden on Powers was published in 1807, and found the Jural region of which it treated untouched by any set work, except Mr. Powell's essay. That manual was an exceedingly good and succinct treatise for the period when it appeared, and, even at the present day, wants only an arrangement of its parts into chapters and sections, with appropriate headings and a table of contents, to endue it with full didactic authority, as it certainly continues, even down to the present, to be an important guide on such points relating to powers as mainly depend for solution upon first principles of law. Mr. Powell was also the author of the *Essay on Wills*, which has been so ably edited by Mr. Jarman, and of the valuable treatise on mortgages, which has likewise

found an experienced editor in Mr. Coventry. The essay on Powers contains, indeed, a single verbal blemish to which we will refer hereafter, but the passage is by no means tainted with the degree of error which Lord St. Leonards attributes to it. We may, perhaps, discover some of the reasons why the subject of Powers received such cursory treatment prior to the appearance of Lord St. Leonards' work, as also why it has since remained in a similar peculiar isolation, by calling to mind that its relations to feudal principles have been discussed by Mr. Butler in his edition of Coke upon Littleton, and by other writers who have treated of the more recondite principles of our real property law; while, on the other hand, those features of powers which have been moulded chiefly by decisions of courts of equity, founded upon the presumed intentions of donors, are to be found in sufficiently ample detail in the books on Uses, and other similar works. The vast extent and intricacy of the subject affords a still further explanation for this almost anomalous paucity of authors on the law of powers. Moreover, so many works have been recently published upon the law of Real Property, as modified by the sweeping enactments of the late and present reigns, that it is not surprising that modern authors have been deterred from treating of the special department of powers.

The only other work, besides those now mentioned, that has been given to the public on this subject, is Mr. Chance's treatise.

A review of that work was given in the seventh volume of the *LAW MAGAZINE*, and a just tribute paid therein to the learning and industry of Mr. Chance. His treatise, however, Minerva-like, has undergone little genetic development. It may, indeed, be consulted with profit upon almost any of the numerous minutiae in which most of the questions incident to the doctrine of powers abound. A main characteristic of that author's views is, that they incline strongly to effectuate the intention of donors of powers. Lord St. Leonards, on the contrary, although

equally well conversant with the history of their equitable genesis as with the principles of law upon which they have been engrafted, nevertheless appears to us, whenever his opinion deviates from what we should be disposed to consider the normal standard, almost invariably to incline to law, rather than to the intention of the donor—to a strict rather than to a liberal construction of powers. The celebrated treatise before us, however, contains an accurate and elaborate elucidation of the law of powers both in its more fundamental principles as also in its minor details. Mr. Butler's commendation, that Lord St. Leonards' treatise has "exhausted the subject of powers," (Note to Co. Litt., 271 b. VIII. 3) is perhaps well founded, at least as regards the more fundamental principles upon which the doctrines relating to this branch of law rest. Its peculiar excellences, indeed, have long given it a foremost place in the estimation of the profession; and there is no doubt that although, in common with all sublunary productions, it has its blemishes and defects, some of which we shall presently endeavour to notice, nevertheless, considered on the whole as an attempt to systematise the *rudis indigestaque moles* of which it treated, or, to use the noble author's words, "to deduce the rules from the decided cases," it is fully entitled to retain that great consideration which even the first edition received. Although the subject of powers has had but few votaries, yet the triumvirate of aspirants to a successful enunciation of the arcana of this obscure branch of law have each, in his time, so well achieved their task as to have left little to be desired by the profession on this head, unless, perhaps, it be an eclectic manual that may still further utilise the labours of Lord St. Leonards and Mr. Chance.

Mr. Chance is of opinion\* "that at common law various powers might be created over freehold estates." Mr. Powell† and Lord St. Leonards, correctly in our opinion, have thought otherwise. Powers were excluded from conveyances at com-

\* Treatise on Powers, p. 3.

† Essay on Powers, p. 1.

mon law by various rules, all of which were of the first importance. Such were the canons, that the freehold could not be limited on a contingency; that it could not be made to vest and revest; and that a stranger could not take advantage of a condition. The only limitation known to the common law that in the least resembles a power is that of an estate upon condition. A condition in one respect resembles a power of revocation, as either may defeat the estate to which it is attached; but the points of difference between them are numerous and important. A stranger could not enter upon breach of a condition; nor, prior to the statute 22 & 23 Vict. c. 35, could its observance be enforced by the grantor after he had even once waived it in any manner. The effect of such a Gordian expedient was, therefore, very different from the plastic and facile action of powers. As an estate of freehold could not pass at common law without a livery of seisin, it is absurd to hold that such an estate could be conveyed by means of a mere power. Once that a feudal seisin was passed to the tenant, it could not be defeated except by an act of equal solemnity, or by a defeasance or condition. These were allowed by the common law to divest an estate, because they were considered as discretionary adjuncts of tenure rather than as private stipulations between the lord and tenant. The livery, no doubt, enured to the benefit of all remainders, whether vested or contingent, that were limited at the time of the creation of the particular estate. But remainders, even those of the contingent class, differ essentially from appointments, inasmuch as the former, even when they do take effect in possession, must, for that purpose, remain for, or await, the determination of the particular estate. It is, on the contrary, the essential characteristic of a power to divest an interest. The examples of common law powers, such as a lease for so many years as another shall name (Co. Litt. 45 b.) which Mr. Chance\* has adduced in support of his position, are, in reality, instances of contingent or conditional limitations. The

\* Pp. 5, 6.



theoretical error of Mr. Chance, however, by no means influences his conception of the law of powers, nor does he deduce any corollary whatever from the position we have noticed. It is, therefore, an innocent mistake, and, indeed, was intended by Mr. Chance to denote certain analogical phases of common law limitations rather than any feudal rule.

Publicity of title was a main object of those feudal principles that related to the transfer of estates. The owners of land, on the other hand, desired that conveyances should admit of secrecy of transfer. Hence, from this conflict of law and expediency, there resulted that complex system of conveyancing which is at present the law of the land. The feudal tenant—or, as he was technically called, the tenant to the precipe—was subject to two classes of duties—feudal and political. He was liable to all normal feudal burdens, and he was also (at least, if his freehold were worth 40*s.*) liable to certain political duties, and entitled to correlative privileges. It was of importance, therefore, that the various heirs in tail or heirs general who might be entitled to fiefs on the death of the tenants, should be capable of being ascertained, both by the local administrators of the law, as also by the superior lords—at least, so far as that the latter could know when they would be entitled to an escheat, or other feudal perquisite. Hence, the remainders engrafted upon the first particular estate and its livery were assumed to be incapable of being disturbed except by an equally public act. It was also necessary for political purposes that the tenant of the particular estate should be ascertained. It followed that the first estate of freehold was not allowed to be limited on a contingency. Publicity was thus rendered necessary in conveyancing at common law, partly upon private and partly upon public grounds.

As a feoffment at common law should, for publicity's sake, be perfected by livery of seisin, so a grant should be followed by attornment, and a lease by the entry of the lessee. Livery of seisin, attornment, and entry, were thus the evidences of

title, which the common law rendered indispensable in the various cases of feoffments, grants, and leases respectively. These public, solemn, and quasi-political investitures may remind the antiquary of the tenure by co-ownership, which is peculiar to a still more primitive state of society, and of which perhaps the feudal system may not be incorrectly considered to have been both a logical and a chronological development.

But we need not pursue this phase of the subject further. Conveyancing by way of trust contravened the rules of the common law that required publicity of title. The Legislature, in passing the Statute of Uses, doubtless intended that it should so operate as that trusts should be created in a public manner. The final effect of the statute was, as our readers are aware, not to subject trusts to the rules of law, but, on the contrary, to subordinate the rules of law to trusts. The Legislature promptly saw that the effect of the Statute of Uses was just the reverse of what had been intended. Accordingly, in the same Session of Parliament in which uses were converted into legal estates, the Statute of Enrolments was passed, in order to secure the main object of the Legislature in its onslaught on trusts. That object was to secure publicity for titles. Our readers know how the Statute of Enrolments was defeated by the adoption of the conveyance by lease and release. The private interests of lessees and tenants were thus all along conflicting with the object sought to be effectuated by the Legislature, and were finally victorious. It is manifest, however, that Parliament would have expressly prohibited a resort to uses instead of turning them into legal interests, had it not considered that the latter class of estates could only be transferred by certain public modes of conveyance. Lord St. Leonards is essentially correct in holding the opinion that the Legislature intended, by means of the Statute of Uses, to abolish trusts. The opposite view appears to be grounded on the fact, that the Statute of Enrolments was passed in the same Session as the Statute of Uses; that it was supplementary to the latter enactment; and that, con-

sequently, the complete extinction of uses was not contemplated by the framers of the statute. But the passing of the Statute of Enrolments only shows that the main object the Legislature then contemplated with respect to uses was, to make conveyances comprising them public. It had, perhaps, no inordinate aversion to uses or trusts as such, but only to their secrecy. It would have been idle, however, to have enacted that all trusts should become legal estates, if these, as Mr. Chance considered, could have been conveyed by means of powers which are equally as secret modes of transfer as direct conveyances by way of trust.

"Simplicity," Lord St. Leonards observes,\* "was the striking feature of the common law in regard as well to the estates which might be created, as to the modes by which they might be raised. Estates," the noble and learned author continues, "could only be limited in possession, or by way of remainder; that is, on the natural expiration of the preceding estate." There does not appear to be much ground for the opinion, that simplicity of conveyancing was a striking feature of the common law. On the contrary, the conveyancing of the early feudal system appears to have been devised with so close a regard to the scholastic logic of the period, and to have comprised such complicated limitations, that there is reason to suppose, that the complete original of that system is not to be found wholly outside the Roman law. We do not mean to concur with Sir F. Palgrave in the opinion that the system of feuds has been derived directly from the Roman *emphyteusis*; but the familiarity of our early lawyers with the digest, and the intricacies sometimes discernible in the wording of ancient deeds, point to the active operation of a refined system of Jurisprudence. The learning of remainders alone shows that the common law was, in its own nature, far removed from simplicity. Those writers, therefore, who think that trusts and powers were grafted upon a wholly heterogeneous stock are, doubtless, mistaken, as far as relates to intricacy of limitation. Mr. Chance's opinion is,

\* P. 1.

in this respect, the more correct one; accordingly, he always leans to the side of the intention of the donor, not contemplating in the common law any such cast-iron rigidity as to present a stout resistance to refined limitations, especially as these have, since the Statute of Uses, obtained the full force of legal interests. Lord St. Leonards, on the other hand, who looks only for simplicity in common law rules and deductions, does not regard with like favour the aim of private intention. But as the *effect* of powers could be attained, even at common law, by a technical circumlocution, and a frequent insertion of alternative series of conditional limitations, this straining at hypothetical first principles has little to recommend it. In whatever way, however, the question of the simplicity of the early common law may be determined, there is no doubt that it aimed at publicity of title. This, indeed, is a species of simplicity; but it relates to the evidence, not to the construction of contracts; although it has had the effect of giving the whole common law system an apparent simplicity of outline.

“The classification of powers,” Lord St. Leonards observes,\* “is important only with reference to the ability of the donee to suspend, extinguish, or merge the power.” These, surely, are matters of the utmost importance. A scientific classification of powers would appear to be feasible as it is important. Powers were divided by Lord Hale, in *Edwards v. Slater*, (Hard. 485, Tudor’s Lead. Cas. Real Prop. p. 247,) into powers simply collateral or not simply collateral. To the former class belong powers given to a party “that has not, nor ever had, any estate in the law.” The second branch of the division comprises powers appendant and powers in gross. In a review of the second edition of Lord St. Leonards’ work, which appeared in the *LAW MAGAZINE*, this principle of the classification of powers was adopted as the most expedient for practical purposes. It is based upon the doctrine that a power of the first class cannot be extinguished by any act of the donee, such

\* P. 49.

power being, in the words of Lord Hale, "no more than a bare nomination;" and that the second class may be either released or extinguished. This division has been adopted by Mr. Powell\* and by most writers since Lord Hale's time. Mr. Chance † impugns the principles upon which it is based, as also its soundness in other respects. He does not, however, distinctly offer any classification of his own, but seems to think that powers may be divided into appendant and collateral, and also into a class partaking of the nature of both. The latter phrase, as it stands, is very ambiguous, but Mr. Chance probably alludes to cases such as where an estate is settled to A. for life, remainder to B. in tail, remainder to A. in fee, and A. has a power to jointure. Such a power is collateral or in gross, as regards the life estate of the donee, and appendant as regards his remainder in fee. The classification adopted by Lord St. Leonards is very indistinct, and does not appear to be based on any definite principle. "Powers," the noble and learned author observes, ‡ "are either given to a person who has an estate limited to him by the deed creating the power, or who had an estate in the land at the time of the execution of the deed, or to a stranger to whom no estate is given; but the power is to be exercised for his own benefit, or to a mere stranger to whom no estate is given; and the power is for the benefit of others. The two first," the noble author proceeds, "may be distinguished into two kinds—first, appendant or appurtenant; second, collateral or in gross. The third, it would seem, is a power in gross. The latter are termed powers simply collateral." This classification, so indistinct in its discrimination, also indicates, on the part of its author, great disregard of logical rules. Are "the two kinds" of powers to which he refers a cross division of his first arrangement (and this, indeed, appears to be the more probable supposition); or are powers in gross to be deemed in all cases to belong only to persons who "had estates in the land at the time of the

\* *Essay on Powers*, p. 8.

† *Treatise on Powers*, p. 13.

‡ P. 46.

execution of the deeds"? This latter view is probably not the one held by the noble author, as it would conflict with established terminology, as also with the context. On the other hand, the cross division is not strictly warranted, for a person who had an estate in the land at the time of the execution of the deed, but not afterwards, cannot have a power appendant. A division of powers that appears to be recommended by its distinctness and simplicity is that which would classify them as—first, appendant; second, collateral or in gross; and thirdly, simply collateral. The first class may be suspended or extinguished; the second class may, doubtless, be released or extinguished; the third, as is commonly supposed, cannot be either suspended or extinguished. This, indeed, as we shall presently endeavour to show, is not so. But as the extinguishment of this class requires very special conveyancing for that purpose, it may be supposed to form a third variety in our classification. This is founded on the power of the donee over the power itself, as distinguished from the subject or object to which it may relate.

The hold which the doctrine that powers simply collateral could not be extinguished by any act of the donee, however unsound in itself, nevertheless had upon the professional mind shows that there has been always observed to be a very great difference between the right of a donee who is the settlor or takes a benefit under the instrument creating the power, and the authority of a donee who is a stranger to the estate. The beneficiary relation of the donee to the power constitutes one of the main principles recommended in the 17th vol. of the *LAW MAGAZINE*, p. 131, for discriminating different kinds of powers. We shall take occasion, in a subsequent part of this paper, to consider the peculiar position of a settlor when he exercises a power of revocation without any declaration of uses.

Lord St. Leonards' reason why certain powers are termed appendant,\* "because they strictly depend upon the estate limited to the person to whom they are given," is justly con-

\* P. 46.

sidered by Mr. Chance to be somewhat vague. Appointments under such powers are not served out of the estate to which the power is appendant; they override and displace it, and therefore cannot be considered as strictly dependent upon such estate. Moreover, a power appendant is not so engrafted upon the estate in which it inheres as not to be supported by its continuance, even after it has been turned into a dry reversion, as the old mode of making a tenant to the precipe shows. A power strictly appendant is, indeed, extinguished by an assignment of the estate to which it is appendant, and so far depends upon the continuance of such estate in the donee of the power; but, as Lord St. Leonards' explanation does not clearly indicate this, and as it is apparently at variance with the rule that appointments are served out of the original seisin, and not out of the derivative estates, we think that the passage is open to much criticism.

A more important position of Lord St. Leonards, which is also combated by Mr. Chance,\* is the statement that the donee of a power simply collateral "cannot by any act whatever suspend or extinguish the power." Mr. Chance observes, in respect to this opinion,† "that nothing would be more unreasonable than that the donee should not be able to extinguish the power in question." We think it will be found, on examination of the cases, that Lord St. Leonards has stated the rule of law in respect to the extinguishment of powers simply collateral more broadly than the authorities warrant. It is plain from Digges' case, (1 Rep. 111, 174; Mo. 605,) that such a power cannot be extinguished by a fine, feoffment, or release of the land, because such a power has no feudal relation to the land. But it by no means follows that it cannot otherwise be destroyed. A judgment creditor, prior to 1 Vict. c. 110, had an inchoate right to a certain interest in the estate of his debtor, somewhat analogous to the force of a power simply collateral. He had neither *jus in re* nor *jus ad rem*, and, though he had released all his right to the land, he could nevertheless extend it after-

\* Vol. i. p. 14.

† Id.

wards. But it does not follow from this that he could not release his right to the judgment, or that if he did, by a legal release or satisfaction, formally renounce such debt, he could afterwards extend the land. It would appear, therefore, that the cases which appear to show that the donee of a power simply collateral who releases his right to the land may, nevertheless, extend it afterwards, by no means prove that the power itself cannot be released. We have not found any case that directly decides this question. The want of cases, however, upon this point is, perhaps, attributable to the fact that such powers are usually accompanied with a trust, and could, therefore, be seldom extinguished, inasmuch as a party to such extinguishment would, as a general rule, be a party to the breach of trust. But we have no doubt that a power simply collateral, the exercise of which rests wholly in the discretion of the donee, and is unaccompanied with a trust, may be extinguished by the donee by means of a release not of his right to the land, for he has not any such right, but of his right to exercise the power. It would be very inconvenient, indeed, if such powers were, unlike any other interest in property, incapable of being released. Mr. Chance considers, that although "no positive and clear discussion has been discovered upon this point," yet that the received doctrine is in conformity with the opinion expressed by Lord St. Leonards. We are strongly disposed to doubt that the Law Courts would at the present day uphold this technical doctrine, which is unsupported in its full extent by any decision.

Lord St. Leonards\* seems disposed to adopt the definition of a power given in Sir Edward Clare's case† as "an authority enabling a person to dispose, through the medium of the Statute of Uses, of an interest vested either in himself or in any other person." He elsewhere regards a power as the mere declaration of a trust or the limitation of a use. All these definitions are no doubt correct. Aiming at logical precision, we may, perhaps, define a power over real estate to be the

\* P. 94.

† 6 Rep. 17 b.



discretionary limitation of a use. It does not, indeed, differ in any important respect from a shifting use in its relations to the estates which it may override, the discretionary adjunct being a matter of pure equity, that has no direct relation to our real property system.

In the early editions of the "Treatise on Powers," Lord St. Leonards expressed an opinion that a conveyance by a tenant for life of his life estate, even if only by way of mortgage, or other limited purpose, would operate as an extinguishment of his powers. Two old cases, *Bury v. White* (Bridg. 91,) and *Vincent v. Ennis* (3 Vin. Abr. 432, fol. 10,) had expressly decided the point. These, however, have been overruled—first, by *Ren v. Bulkeley*, decided by Lord Mansfield (Doug. 292,) and more recently by *Long v. Rankin*, decided by the House of Lords (Sug. App. No. 2.) In the former case, a tenant for life, with leasing powers, conveyed away his life estate to secure an annuity. Lord Mansfield decided against the extinguishment of the leasing powers, as being contrary to the intention of the parties to the deed of annuity. The reason assigned by Lord Mansfield in support of his decision is perhaps of itself insufficient to sustain that decision. The intention of the parties could not control the legal effect of a conveyance. Lord Mansfield, we may observe, in many cases supported his decisions by reasons which, in the Court of Chancery, would have been unexceptionable in a contest between different equities exclusively, but which were out of place on his side of Westminster Hall. However, the authority of that eminent judge has caused his innovations to be, as a general rule, followed by his successors. Accordingly, in the case of *Long v. Rankin*, the judges were unanimously of opinion that a power appendant to a life estate was not necessarily extinguished upon conveyance of such estate by the tenant for life. The annuity deed in that case, indeed, contained an express stipulation that the tenant for life might exercise his power of leasing with the consent of the mortgagee. But this does not affect the question, (as is justly observed by Lord St. Leo-

nards,) as to whether the power is not in such a case extinguished as against the remainder-man. We consider, however, that the view propounded by Lord St. Leonards in the previous editions of the "Treatise on Powers," not to be as clearly based upon first principles as the noble author supposed, and as, indeed, the profession generally considered. A mortgage, or a conveyance to pay debts, does not operate in equity as a revocation of a prior will in respect to the equity of redemption. We do not think, therefore, that there is much weight in the suggestion advanced by the noble author, that the mortgagee of an estate to which a power is appendant has the legal estate as much before foreclosure as after it. The mode adopted by a tenant for life prior to the 3 & 4 Will. IV. c. 74, for making a tenant to the precipe, in order that a recovery might be suffered by a remainder-man in tail, appears at first sight to show what have been the views generally held by conveyancers upon this matter. The tenant for life, as our readers are aware, conveyed to the intended tenant to the precipe only for both their joint lives. This left a reversion in the tenant for life, in which his powers inhered. This adroit species of conveyancing, we admit, would have been unnecessary, if a clause could be usefully inserted to the effect that the conveyance was only for a limited purpose, or that it was not to affect the powers of the tenant for life. Such a stipulation would, indeed, have bound the parties to it, at all events, by estoppel; but it would invalidate the recovery as not being in technical harmony with the fiction upon which that mode of assurance was based. This system of conveyancing, therefore, proves nothing in respect to the present question; while the analogy of the mortgage of an estate previously disposed of by will shows that equity does not follow the law in its construction of instruments of mortgage or annuity, although, in a department of jurisprudence but little less peculiarly its own, the Court will respect even a fiction if it is recognised at law. It is, at all events, now clearly settled by the decision in *Long v. Rankin*, that mortgages or similar conveyances of a life

estate for limited purposes do not destroy any powers appendant to such life estate. Lord St. Leonards accordingly has, in the recent editions of his work, ceased to launch his eloquent arguments against the rule thus established. "These decisions," the noble author observes,\* "have the merit of giving effect to the intention of parties without infringing upon the rights of others; but it is difficult to support some of them upon strict legal principles, and they should not be carried further." We cannot concur in either of these sentiments. We think our equity jurisprudence in respect of mortgages is sufficiently consistent with itself, and that even rules of law were intended to subserve public convenience, and to effectuate, not to oppose, the intentions of grantors. Although, therefore, the harmony of our real property system should be still further broken up by inroads upon its first principles, we could not regret such innovations, if they furthered the intentions of grantors and donors of powers. Indeed, it is very doubtful whether the first principles of the common law, if reasoned from in no narrow-minded method, would not admit of deductions as complicated, and apparently as opposed to feudal premises, as are any of the decisions that we find strained to give effect to the intention of a grantor; just as Lord Coke's scientific prototype of the law of descent, the principles of gravitation, are found to be the ultimate cause of many physical phenomena, which to a cursory observer appear to be most opposed to such a law of nature.

With reference to the expediency of the decision in *Ren v. Bulkeley*, and *Long v. Rankin*, Lord St. Leonards† observes:—"It may, therefore, be of deep importance to a remainder-man that the tenant for life, after he has involved himself with annuity transactions, and transferred his life estate to secure them, should not be at liberty to exercise the power of leasing under the direction of the annuitants, when it has become a matter of little interest to himself upon what terms a lease is granted." We think, however, that the balance of

\* P. 66.

† P. 69.

inconvenience would be entirely on the side of the rule which Lord St. Leonards favours. What could be more inconvenient than that the tenant for life, with usual powers, should put an end to his management of the estate the moment he granted a mortgage for £10? As Irish judgments, when registered, become mortgages, the inconvenience of the rule advocated by Lord St. Leonards would render property in Ireland almost incapable of being incumbered. The noble author appears to have anticipated the inconvenient results that would ensue from the rule he favours in respect to the present question. Accordingly, he disapproves of the decision in *Badham v. Mee* (7 Bing. 695; 1 Mo. & Sc. 14.) That case (since overruled by *Jones v. Winwood*) decided that the power of a father to appoint among his children exclusively was extinguished upon his bankruptcy, as it operated as an assignment of his life estate and a remote remainder. The ground, indeed, upon which that decision appears to have proceeded was, that the appointment was invalid as creating a base fee, as if this could not co-exist with the remainder in fee in the assignees—a proposition that at the present day needs no refutation. In reference to *Badham v. Mee*, Lord St. Leonards correctly observes,\* that “the Bankrupt Law ought not to be held to destroy the powers in a family settlement, where their existence and the exercise of them do not affect the rights of the creditors.” But this reasoning surely applies *à fortiori* to cases of only the partial insolvency of the donee.

A considerable share was devoted by the noble author, in the former editions of his work, to the consideration of the doctrine of the *Scintilla Juris*, with a view to its refutation. Lord St. Leonards did not discuss the relations of that doctrine to the rule against perpetuities, as that rule is now formally applied to all future uses that cannot take effect as remainders. He regarded the doctrine in a new and formidable aspect. It is settled law that a use cannot be more extensive than the seisin upon which it is engrafted:—thus,

\* P. 76.

if land be limited to A. for life to the use of B. in tail, B. takes only a life estate (Vaughan, Rep. 49.) It would seem to follow, as a necessary consequence of this doctrine, that if a grantee to uses died without leaving an heir, the lord by escheat would not be subject to the uses. This was the difficulty suggested to Lord St. Leonards by the doctrine of the *Scintilla*, to the consideration of which he devoted, in his former editions of the "Treatise on Powers," more space than we think he did argument. The question, whether an escheat is subject to a trust charged on the land escheated, has never yet been determined. It was settled, in the great case of Burgess and Wheate,\* that on failure of the heirs of *cestuys que trust*, the trustee held the land for his own benefit. The principle of this case goes to show that there is no privity between the *cestuys que use* and the lord paramount. As the lord does not gain the trust by escheat, upon failure of the heirs of *cestuys que trust*, the converse rule would seem to apply, so that the lord should not be subject to the trust upon failure of the heirs of the trustee. Any other rule upon this point diminishes, for the lord, the value of his possibility of reverter; for, if he is not to get an escheat of the trust estate (Burgess and Wheate, *ut sup.*) and is, on the other hand, to be burdened with the trust, upon failure of the heirs of the trustee, he cannot enjoy any beneficial interest in the land until the heirs *both* of the trustee and of the *cestuys que trust* are wholly extinct. Notwithstanding the disregard of feudal rights thus involved in the proposition that a lord by escheat is bound to discharge the trusts attached to the land, nevertheless, the current of authorities is decidedly in favour of that view. Thus, in *Eales v. England*, Prec. Cha. 200, Sir T. Trevor considered that the lord by escheat would hold the land "subject to the trust in equity." In Paulett's case, it was held that an equity of redemption could be enforced against the Crown after it had obtained lands forfeited to it by the attainder of the mortgagee. This case is a very im-

\* 1 Eden, 177.

portant authority in respect to this question, because the king comes in the *post*. *Fawcett v. Lowther*, 2 Nes. 300, and *Middleton v. Spicer*, 1 Bro. C. C. 201, also further support the principle of Paulett's case. There does not, indeed, appear to be any implied condition that, on failure of the heirs of an immediate grantee of land, the lord is necessarily to have an escheat; for the grantee may assign, and the assignee or his heirs will hold, even though the first grantee should die without an heir. The principle of escheats, therefore, is to be referred to the want of a *tenant* who could perform the services, rather than to the want of an heir of the first grantee.

Since the Statute 39 & 40 Geo. III. c. 38, the question, whether an escheat is subject to a trust, is not likely to arise in respect of the treason or felony of a trustee. The Statutes 4 & 5 Will. IV. c. 23, and 1 & 2 Vict. c. 69, have provided against the contingency of a trustee not being within the jurisdiction, or not leaving an heir. These enactments have been consolidated and extended by the 13 & 14 Vict. c. 60—the Trustee Relief Act, 1850. If a grantee to uses should be considered as a trustee, within the meaning of these Acts, no difficulty could have been occasioned, at least in equity, by the doctrine of the *Scintilla Juris*. It is doubtful, however, whether a grantee to uses, who is a mere conduit-pipe, and has no active functions to perform, could be considered as within the scope of the 13 & 14 Vict. c. 60. The question of the *Scintilla Juris* and its kindred difficulties might possibly, notwithstanding these enactments, be left still to be, even in equity, determined by a reference to feudal principles only.

Lord St. Leonards observed, in his edition of "Gilbert on Uses," p. 301, in respect to the doctrine of the *Scintilla*, "The point, however, although attractive, from its singularity and abstruseness, is at this day wholly unimportant." We do not think that the main question raised by the doctrine of the *Scintilla* is unimportant; and the noble author himself cannot have thought so, when he devoted so much atten-

tion to the consideration of the doctrine, or when he had the obnoxious *Scintilla* formerly abolished by the 7th section of the 23 & 24 Vict. c. 38. The effect of a releasee or a grantee to uses dying without an heir, upon the rights of a contingent *cestuys que use*, is surely very important. Suppose that A., releasee or grantee to the use of B. in fee, subject to a general power limited to B., has died without leaving an heir, could the power be executed so as to vest the estate in a purchaser—at law,—or in equity? It might be contended that B. has not the equity now against A. and his heirs which he would have had if the grant were made prior to the Statute of Uses, because one of the effects of that statute was to leave the feoffee or grantee to uses no control over the land. B. or his appointee might, therefore, have no *locus standi* in a court of equity in any case against A. or his heirs. It would follow from this, *à fortiori*, that B. or his appointee would have no equity against the lord or the crown by escheat. But let us suppose that B. or his appointee would have an equity against A. or his heirs in certain cases—in other words, that in all possible cases in which the Statute of Uses could not be considered to have operated, that B. or his appointee would have those equities against A. or his heirs, which they would have had if the Statute of Uses had not been passed—nevertheless, it could not be contended, on failure of A.'s heirs, that B. or his appointee should be deemed to have the legal fee prior to a conveyance of such from the lord or the Crown, there being no legal seisin commensurate with such a trust. The question, indeed, would have lost a great deal of its importance, if it were clear that the lord or the Crown holds an escheat subject to the trusts attached to the land. The appointee would merely want the legal estate. But that he would have even an equitable title is, as we have endeavoured to show, very doubtful; and, at all events, a conveyance of the fee by the lord or the Crown to the *cestuy's que use* or appointee of B. should be taken by him, subject to the incumbrances affecting the possibility of reverter. But

we think that it could not for a moment be contended that a *cestuy's que use* or appointee should be deemed to have the legal estate in the land, the releasee or grantee to uses being *ex hypothesi* dead, without having left any heir. It would have been eminently desirable, therefore, that the Legislature should have declared that the fact of a releasee or grantee to uses dying without an heir should not have any effect upon the rights of *cestuys que use*; in other words, that such grantee should, in respect to his seisin, however momentary, be deemed to be a trustee within the meaning of the Trustee Relief Act, 1850, without prejudice to such rights of *cestuy's que use* as he might derive under the Statute of Uses. This was, doubtless, the object of the 7th section of Lord St. Leonards' Property Act; but, instead of a simple and direct enactment to this effect, he has given an argumentative one, which, perhaps, has not removed the real difficulty. The section is very indistinctly worded; for it applies to every class of uses without distinguishing between them and trusts. Indeed, it may, possibly, in respect to the present question, be construed as relating to grants by grantees to uses, and not to infringe upon the general rule of law, that a use cannot be more extensive than the seisin upon which it is engrafted. The most appropriate method of defeating the obnoxious *scintilla* would have been, as we have stated, to enact in direct terms that the estate of *cestuy's que use*, or of *cestuy's que trust*, should in no case be abridged by reference to the seisin intended to support such use or trust, but only in respect to the powers of the party creating such use or trust to create a seisin.

It has not unfrequently happened that an instrument which could not take effect as a bargain and sale for want of enrolment has been construed to be a covenant to stand seised, if the parties, as is always the case in settlements, were mutually related by blood or marriage. A like construction would be given with advantage to a lease and release at common law, if the lessee had not entered before he obtained the release, or to a lease and release if the lease professed to be made under the



Statute of Uses, but wanted a consideration both expressly and in fact. In short, the construing an instrument to be a covenant to stand seised, has been, in very many cases, a sort of *tabula in naufragio* whenever the instrument failed of taking effect, according to the intended mode of its operation, by reason of some non-compliance with a technical requirement, such as entry or enrolment. Although the Act, 8 & 9 Vict. c. 106, has placed the freehold in grant, so that no instrument executed since the passing of that enactment must, of necessity, be construed to be a covenant to stand seised, unless, it may be, where it professes to create a freehold *in futuro*, nevertheless, the rules of construction applicable to covenants to stand seised are still important as regards informal settlements of a date prior to the 1st October, 1846. It has been a moot point amongst conveyancers whether general powers to lease, &c., can be reserved in such instruments, or in bargains and sales. This question is very important, for the reasons we have just mentioned. Mr. Cruise\* considers that the usual leasing powers may be reserved in such instruments, "as the best rent is required to be reserved in such leases." Mr. Chance† appears to consider the invalidity of general powers in both classes of instruments to be established by the decisions, but impugns the soundness of the principle upon which these cases appear to have proceeded. Lord St. Leonards‡ likewise considers the invalidity of such powers to have been settled by the authorities, but he is of opinion that the principle of the cases which have established this rule is entirely unimpeachable. For our part, we consider that the doctrine alleged is by no means settled by the authorities—at least, as regards deeds of bargain and sale: nor, if the cases had decided against the validity of such powers in those instruments, could the prohibition be as readily reconciled with first principles as Lord St. Leonards appears to consider. In the first place, we may repeat that the question is one of very great importance; because, if an instrument containing such powers must, of necessity, be construed a covenant to stand

\* 4 Cru. Dig. 322.

† P. 26.

‡ P. 138.

seised, the object of so construing a deed will be somewhat defeated, if the deed is to be truncated of all clauses relating to powers. The principle upon which Lord St. Leonards rests his support of the affirmative of this proposition, is that “equity,\* before the Statute of Uses, would not sanction so indefinite an executory agreement.” The noble author has, we think, mistaken the true ground of the difficulty of this question. Equity, before the Statute of Uses, would have enforced the performance of an agreement, however indefinite it might have been, provided that there was a consideration for the contract. It is the nature of the consideration, not the indefiniteness of the agreement, that raises the difficulty incident to the execution of powers reserved in instruments that do not operate by transmutation of possession. Chief Baron Gilbert touched the gist of this matter when he observed, “that where *the persons are altogether uncertain and the terms unknown* there can be no *consideration*, and for which reason the former estates raised upon good consideration cannot by such leases be defeated.”† If it can be shown that the powers in dispute are not open to the objection urged in this passage, the substance of which is embodied in the second resolution in *Mildmay’s case*,‡ there does not appear to be any other reason to contend that such powers are invalid. *Mildmay’s case*, which is relied on as a leading authority against the validity of the powers in question, does not really decide the point. The second resolution in that case declares, that if, in a deed operating as a covenant to stand seised, “a provision is added that the covenantor, for divers good considerations, may make leases for years, &c.,” such power is void in its creation. The proviso in that case, by its mention of *other good considerations*, manifestly refers to a departure from the original consideration of the deed—viz., affinity or consanguinity. No use arose in favour of the unknown class of lessees at the time of the execution of the deed, and, consequently, none could arise afterwards. It results from the nature of a covenant

\* P. 138.

† *Gilb. Uses*, 46.

‡ 1 Rep. 175.

to stand seised that a general power in it of any description is void in its creation, for the appointees do not necessarily come within the peculiar consideration which alone can support such an instrument, nor can the uncertain element be eliminated from the power so as to give it any effect even in equity. Accordingly, *Goodtitle v. Pettoe* (Fitzg. 229; 2 Str. 934,) is conclusive authority against the validity of a general power to lease, or of any other general power, in an instrument which can take effect only as a covenant to stand seised.

Bargains and sales and covenants to stand seised have been discussed on the same footing, in respect to the present question, by all writers on this subject. "If such leases," says Lord St. Leonards,\* "were to be supported, it might, on the same ground, be argued, that contingent uses to persons not *in esse* could be raised on a bargain and sale, provided they paid a consideration when born." Does Lord St. Leonards mean to contend that contingent uses cannot be raised to persons not *in esse*, even without any payment by them when born? If a consideration can be given on their behalf to the bargainor at the time of the execution of the deed, is it not sufficient? A payment by a contingent *cestuy's que use* himself, indeed, cannot affect the nature and operation of an instrument executed before he came into *esse*. But the mere fact of a *cestuy's que use* being contingent and uncertain raises no impediment to his taking a benefit under a deed not operating by transmutation of possession. Lord St. Leonards continues: "Besides, powers could not, under any construction, be reserved on a bargain and sale to any but the bargainor, as the consideration must be paid to *him* in order to raise the use."† The reason here advanced is insufficient to warrant the opinion founded upon it by Lord St. Leonards. An appointee is a purchaser in every case where the original instrument is founded upon a valuable consideration, no matter whether the vendor or stranger is the donee of the power. We are not left, however, in respect of this question, solely to a dialectic analysis of first

\* P. 139.

† Id.

principles; for it appears from 2 Roll's Abridgment, 784, pp. 5, 6, Winch 61, that if a person, in consideration of a sum paid by B., bargain and sell land to A. for life, remainder to B. in fee, these uses will arise to B. and C.; for, though they paid nothing for the land, yet B.'s payments on their behalf suffices. It also appears from the same passage in Roll, that if the bargain and sale had been made to B. for life, with many remainders over, the consideration may well extend to those in remainder. Surely a treatise, the eighth edition of which contains such a mistake respecting so elementary a proposition as that which we are here noticing, is not to be deemed entitled to a paramount authority whenever its author chooses to do violence to the intention of grantors. As regards future or contingent uses, there cannot be a doubt, as we have shown that they can be raised by any mode of conveyance. For instance, in a marriage settlement, the husband may covenant to stand seised of land to his own use for life, remainder to his first and other unborn sons in tail, &c. So, also, might he, in consideration of the marriage portion, bargain and sell the land to the use of his wife for a jointure, remainder to his first and other unborn sons in tail, &c. *Vide* Gilb. Uses, pp. 197, 198. The observations that occur in the books, therefore, to the effect that there cannot be any future or springing uses limited to arise in a deed of bargain and sale, can only mean that such uses cannot be limited after a previous limitation of the fee. We now see that the observation of Lord St. Leonards as to the invalidity of future uses limited in a deed of bargain and sale is not warranted by the authorities.

As contingent uses may be limited in conveyances not operating by transmutation of possession, the question arises why may not appointments, which are in substance shifting uses, be also limited in such instruments. We have seen that if a consideration be paid on behalf of the contingent *cestuy's que use*, it is sufficient to raise a use to him when he comes *in esse*, and he need not then pay anything himself. A case is put *arguendo* by Popham, in his Reports, p. 81, to the effect that a leasing

power cannot be given to a tenant for life in a deed of bargain and sale. The remark of Popham, however, only goes to prove that the bargainor should *expressly* agree to stand seised to the use of the lessees in whose behalf the tenant for life should exercise his powers. His opinion, therefore, is in favour of the validity of such powers if limited by appropriate conveyancing terms. It is impossible to distinguish on principle appointments under any description of powers from ordinary contingent uses; and as these are good in deeds of bargain and sale, or of covenant to stand seised, so also are appointments valid that are made under powers reserved in such instruments, so far as the appointments are made for appropriate considerations. We consider, therefore, that every species of powers may be limited by a deed of bargain and sale, if the consideration be either expressed to be paid on behalf of the intended appointees, or even if it implicitly extend to them; and that special powers may be limited in deeds of covenant to stand seised in behalf of a party or class within the consideration necessary to raise a use in such an instrument. (*Mildmay's Case*, 1 Rep. 174 b.; *Goodtitle v. Pettoe*.) But general powers cannot be reserved in a deed of covenant to stand seised. The reason of this restriction, however, is not attributable to the fact that the conveyance does not operate by transmutation of possession, but is to be found in the nature of the peculiar consideration of relationship which alone can, in such a conveyance, raise a use. We consider, therefore, that bargains and sales are, in respect to the present question, distinguishable in some respects from covenants to stand seised. We see no objection, in point of principle, to the reservation of general powers in deeds of bargain and sale, and none of the cases adduced in support of the contrary opinion tends by any means to warrant that conclusion.

The common doctrine on this point is considered by Mr. Chance\* to be somewhat anomalous, inasmuch as the powers reserved in marriage settlements are for the benefit of the parties claiming in respect of the marriage. But Mr. Chance's view

\* P. 26.

is not based upon any sound principle; for the use is raised under the leasing power not to any party to the settlement, but to the lessee. That the lease may, *in fact*, indirectly redound to the benefit of the parties to the settlement cannot affect the legal relations of the conveyance. We do not think, therefore, that the common opinion is unwarranted as regards covenants to stand seised. Indeed, the disuse of that class of assurances was owing to the fact that a limitation even to trustees to preserve contingent remainders, could not have been inserted in such deeds, as the trustees did not come within the consideration. Mr. Chance's view is, therefore, not in accordance with the general principles to which covenants to stand seised must of necessity conform. He also considers that equity would relieve in cases in which powers might be respectively raised in this class of instruments. It is not, however, by any means tenable to contend that a defective appointment, much less a defective power, would be rectified by the court in favour of a party not within the range of the consideration, upon [which alone those classes of conveyances can be respectively founded. Such an opinion is in direct conflict with the general principle of equity Jurisprudence, that the Court will not rectify a defective conveyance on behalf of a mere volunteer.

Mr. Chance is of opinion that a power of revocation does not, under any circumstances, imply *in se* a power to limit new uses. Fonblanque, (Treat. Eq., p. 163, 2nd edit.,) Cruise, (4 Dig. 232, s. 18,) and Preston, (Abs. 27,) have also expressed doubts as to the authority of a donee so circumstanced to limit new uses. Lord St. Leonards (p. 372) accuses Mr. Powell of laying down both the affirmative and the negative of this proposition. We consider this accusation to be based on insufficient grounds, if not wholly unwarranted. (*Vide* "Powell on Powers," pp. 244, 272.) His opinion, however, on this question, which is declared by him in the latter passage only, coincided with the views of Mr. Chance. Lord St. Leonards considers that new uses may be limited under such a power, if

it shall have been limited in an original settlement; but he lays down a different rule, if the power be reserved in a deed of appointment. It seems strange that so different a rule of construction should be applied to original conveyances from that applicable to derivative ones, such as deeds of appointment. In *Witham v. Bland*, (3 Swans. 277,) Lord Nottingham decided in favour of the appointment; but he drew no distinction between original and derivative instruments, and rested his decision upon the ground that, if the appointment should not be held good, the feoffee would hold the land to his own use. Lord St. Leonards himself admits that this reason is unsound, for there would be a resulting use to the settler. The invalidity of an appointment where the power was only to revoke is, on the other hand, opposed to various dicta. (*Vide* 1 Vent. 197; *Ward v. Lenthal*; as also 1 Sid. 143; as also to the express decision in 1 Str. 584.) Lord St. Leonards, however, seems to consider the law as settled in respect to this question. (*Vide Montague v. Kator*, 8 Ex. Rep. 530.) Mr. Chance (p. 114) is of opinion that the question is not very important, because the donee of the power generally has a resulting trust. As such, indeed, is usually the case, the question is not of much importance as between the donee of the power and the appointees; but, if the donee have aliened or incumbered his interest, or confessed judgments in the interval between the passing of the 1 & 2 Vict. c. 110, and the 23 & 24 Vict. c. 81, the appointment should, according to one view of this question, be postponed to such assignment or incumbrance. (*Noel v. Henley*, 2 McL. & Y. P. 302.) Such a place in the order of priority might deprive the appointment of all value; and even though the revocation and appointment should be made by a single instrument, yet it would be construed as virtually consisting of two parts, the appointment being subsequent in point of time and legal effect to the revocation. (*Digge's case*, 1 Rep. 164-6 resol.; S. C. Mo. 603; Co. Litt. 237 a.) The use would consequently result for some period of time, however short, to the ap-

pointor. This being so, the resulting use becomes subject to his grants and charges, and cannot be disposed of to the appointee without being subject to such incumbrances.

In the review of the sixth edition of this treatise, which appeared in the *LAW MAGAZINE*, vol. 17, there occurs a criticism of Lord St. Leonards' view of *Reade v. Reade*, 5 Ves. 744. The principle of that decision is stated by Lord St. Leonards to be, that "where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects in the life of the testator will *pro tanto* defeat the power and devise only, so that the power and devise will only remain as to the shares of the survivors." Mr. Jarman considers the case of *Reade v. Reade* to be inconsistent with the decision in *Boyle v. Bishop of Peterborough*, 1 Ves. Jun. 299, the principle of which is correctly stated, by Sir T. Plumer, to be "that the death of one of the class over whom the power extends, even where there is no power of exclusion, does not prevent an appointment amongst the survivors of the whole sum to the full extent of the power." It should not, we think, be considered that, because an object may get only a very inconsiderable portion of the property to be appointed, the lapse of his share deprives the donee of his power as to the whole vested interest which such object took, and which he could, except as to an illusory share, completely divert. Lord St. Leonards' reasoning on this head is correct in point of technical deduction, but it is opposed to the more general principles of equity and intention, upon which the whole doctrine of powers rests. The case of *Boyle v. Bishop of Peterborough* has been (as is stated in the present edition) followed in the late case of *Rickets v. Loftus*, (4 Yo. and Coll. 519,) although all the children were named in the powers.

The principle of *Boyle v. Peterborough* is strengthened by the main scope of the Act relating to illusory appointments, which was prepared by Lord St. Leonards. As equity follows the law, *à fortiori* it should follow the policy of a statute



especially intended to regulate its peculiar jurisprudence. This enactment enlarges the discretion of donees of powers of distribution. In the conflict of principles that exists in the decided cases it should be deemed as operating to determine the point in favour of the continuance of the donee's full power. The Act itself, indeed, appears to us to be very imperfect. Every power ought to be declared by statute to be an exclusive one, unless a contrary intention is expressed by the donor. What is the use of requiring that an illusory appointment should be made? But, as the law now stands, although the donee of the power is not bound to give a substantial share to each of the objects, he is, nevertheless, bound to go through the form of giving each a nominal share; otherwise the last execution is void. The Act is, moreover, irregular in its pressure, inasmuch as an appointee who may not have been more favoured by the donee than previous appointees were alone loses, as before the Act, the entire of the share appointed to him, and is the sole sufferer of the loss. An exclusive appointment, not authorized by this Act, is, consequently, as invalid since its passing as it had been before it.

Lord St. Leonards appears to consider \* "that, where an estate is given *absolutely*," by will made prior to 1 Vict. c. 26, "without any prior limited interest, to such uses as a person shall appoint, it would be an estate in fee." It is, we think, doubtful whether such a limitation, without furthermore, does not create a bare power only, without any interest prior to its execution. Lord St. Leonards,† inconsistently with his view upon this point, but correctly, we think, considers that a "devise of land to be sold by executors" gives them only a power. The Wills' Act, 1 Vict. c. 26, applies to devises by donees of general powers, but not to limitations creating such powers. Questions relating to such limitations are, therefore, not much affected by that Act. (*Vide* H. Sugd. Wills, 133.)

Lord St. Leonards considers that the distinction formerly taken between a power limited to a stranger and one limited to

\* P. 104.

† P. 113.

the owner is "completely exploded at the present day." Mr. Chance, however, is, we think more correctly, of a different opinion. The intention of the grantor is, perhaps, more frequently to be considered in cases of powers than in any other description of limitations contained in instruments *inter vivos*. Lord St. Leonards considers\* that a power limited on a contingency may be exercised before the contingency happens. We think with Mr. Chance, that the proposition is somewhat too broadly stated. The intention of the donor and the nature of the discretion reposed in the donee must be, in all such cases, referred to, in order to determine the period when the power may be irrevocably exercised. It will, however, seldom happen that a premature execution will be inoperative.

Lord St. Leonards considers that a power given to a party to be exercised by the donee when in possession cannot be accelerated by a surrender of any previous estate, but may upon the forfeiture of such estate. Mr. Butlert† considered that it can be exercised upon an actual surrender. We are of this opinion, provided that the surrender is made *bonâ fide*, without any intent to commit a fraud upon the settlor or remainder-man.

Lord St. Leonards thinks that it is anomalous that a *feme covert* should be allowed to exercise a general power which divests an interest in her. We think, on the contrary, that this mode of defeating a possible marital right is very consonant to the general doctrine of trusts of *feme covert's* separate estate. Whether a power given to a *feme sole* may, without any express provision to that effect, be exercised by her after her marriage, appears, however, not to be very clearly settled by the cases; although Lord St. Leonards thinks otherwise. He also considers‡ that a *feme covert* has an implied power of appointment over property settled to her separate use. Mr. Chance thinks that the noble author did not mean

\* P. 262.

† Note to Co. Litt. 271 b. (vii. 2) 17th ed.

‡ P. 207.

to comprise real estate within the gifts referred to. The position of Lord St. Leonards cannot, we think, be impugned either on principle or by a reference to the authorities. Indeed, the effect of the old limitation to uses, to bar dower, shows that marriage cannot be deemed to be an assignment to the wife or husband of dower or curtesy so as to suspend the exercise of a power or make it dependent upon the joint convenience of both husband and wife.

The noble author, as also Mr. Chance, seems to consider that powers, coupled with trusts, cannot readily be distinguished from trusts by implication, in default of appointment. There is, we think, a very clear ground of distinction between the two classes of cases; for, as regards the latter category, the donee of the power takes no interest over which the power may override. The distinction is of some practical importance, because the donee of a power, who has also the legal interest, might, under certain circumstances, extinguish the trust by a conveyance to a purchaser for value without notice. But a bare donee of a power, not having any interest in the land subject to it, cannot, *ex necessitate rei*, convey to a purchaser without notice. Even if this ground of distinction could not be established, yet the classification which we are noticing is deserving of our adoption, inasmuch as it is important in respect to the received opinion regarding the donee's power to extinguish it. If it is a power coupled with a trust it is clear he can extinguish it, because, as he takes the legal estate in the property, his power is not simply collateral. If the trust arise by implication, in default of appointment, his power as such is simply collateral; and, consequently, as such, cannot, according to the received rule, be extinguished. In both cases alike, however, any question of notice will be equally efficacious as regards the *cestuy's que trust*. The same conditions likewise are, indeed, necessary to be fulfilled in both classes of cases, in order that the intended appointees may take in default of appointment. These conditions are imperative of direction to the donee to execute the power, and

certainty of the subjects and objects to which the power relates. This concise criterion may be extracted from the cases cited by Lord St. Leonards under this head, and his observations thereon, but is not as distinctly propounded by him as the doctrine admits of, and as the importance of the matter deserves.

Whatever doubts were entertained regarding the validity of general powers of sale and exchange, in their relation to the rule against perpetuities, have been set at rest by the recent case of *Wallis v. Freestone*, 10 Sim. 225. Lord St. Leonards had previously pronounced in favour of the validity of such powers, and pointed out the true ground of the decision in *Ware v. Polhill*, 11 Ves. 257, which was, that the case related to a settlement of leaseholds. But any power reserved in a settlement of freeholds can, of course, be barred by the first tenant in tail who comes of age, and cannot, therefore, be too remote. As regards the remainder in fee, the power, as observed by the Irish Lord Chancellor, in 4 *Dru. v. War.* 32, fails, not being required to convey such remainder, and need not, therefore, be considered in respect to it. The validity of powers of sale and exchange limited in a settlement, and not confined expressly within the limits defined by the rule against perpetuities, is rested, by Lord St. Leonards, on the ground "that a shifting use may be limited to take effect at any period however remote, where the estate is regularly limited in tail, because the tenant in tail may destroy the shifting use."\* This passage is not worded with sufficient accuracy. A shifting use may be too remote, even though an entail be limited in the same deed. Suppose a limitation to A., an infant in tail, with a shifting use to B., a hundred years hence. In this case, if A. died immediately afterwards without issue, the inheritance would be suspended for a hundred years. The Editor of Fearn's "Con. Rem." states the law more correctly, when he confines this rule to cases of executory limitations "engrafted on an estate tail."† Unless the executory

\* P. 848.

† Essay on "Con. Rem." p. 522, ed. 1844.

limitation be engrafted upon, or be only co-extensive with the estate tail, it obviously does not come within the favoured class of exceptions to the rule against perpetuities. Doubts regarding the validity of powers of sale and exchange not expressly limited to be exercised within the period allowed by that rule, would appear to be corroborated, if such powers are to be considered, when simply collateral, to be incapable of being released or extinguished. That all such powers admit of being extinguished otherwise than by an execution of them, we have already endeavoured to show. It is, however, necessary that they be either expressly, or by means of the paramount limitation of an estate tail, confined within the period allowed by the rule against perpetuities. It should also be remembered that they cannot be limited at random in every deed containing a limitation of an estate tail, but should, if extended to the heirs of the donee, be carefully limited, either expressly or by implication, to the duration of the estates tail.

Lord St. Leonards\* is of opinion that a defective voluntary execution of a general power will not constitute the subject of the appointment assets for the creditors of the donee. "There is no authority," the noble author observes, "for this circuitous relief, and it may well be doubted whether it will ever be granted." He adds, "The common equity in favour of creditors, when the fund is given to others, does not arise until the power is legally executed." In *Holmes v. Coghill*, 12 Nes. 206, which is referred to by Lord St. Leonards, Lord Erskine appeared to think that equity might interfere on behalf of the creditors. The ground upon which Lord St. Leonards rests his opinion on this matter is, that by constituting the subject-matter of the appointment assets for the creditors of the donee "the intention of the donee of the power would be defeated." Mr. Chance† very pertinently suggests, in reply to this argument, that we are not to presume that the donee is dishonest. He also notices that:

\* P. 540.

† Vol. 2, 495.

the intention of the donee would be defeated, as the law at present stands, if the appointment were final. This observation appears to us completely to overthrow Lord St. Leonards' argument. As regards the alleged circuitousness of the relief, it is not so much the appointee as the person in whom the legal interest in the property is vested, that it is chiefly necessary to constitute a trustee for the donee's creditors. As an imperfect execution, if made directly to them, would be aided in equity, there is no necessity for holding that there is a certain degree of informality against which equity will not relieve. The Court, indeed, never aids a non-execution. But, surely, Lord St. Leonards cannot consider a defective appointment as no better in any respect than a case of non-execution. Any appointment shows an intention on the part of the donee to divest an interest. Moreover, it is not necessary that a trustee is to have the legal interest in the subject-matter of the trust. An equitable interest may be vested in a trustee to be held by him upon ulterior trusts. Would it be any answer to a bill filed by the *cestuy's que trust* of such a person that he had not, and never had, the legal interest in the property? We frequently find an undue appreciation of technical analogies on the part of the noble author. The doctrine of marshalling, it is true, is not extended to cases where two or more persons are under a joint obligation to one party, and one of them is under an obligation to another creditor; neither can a trust estate be more extensive than the seisin upon which it is engrafted. But even the doctrine of marshalling is not to be forced within its natural bounds, merely because it ought not to be applied to adjust certain peculiar cases of conflicting claims. Neither is the creation of any seisin whatever necessary to render an agreement enforceable against a party to it. If the donee had in the case supposed contracted to execute his power in behalf of his creditors, equity would decree a specific performance of the agreement. The donee would be a trustee in such a case. Why should he not be turned into a constructive trustee in all

cases where he has sought to evade his legal liabilities and his power be deemed to be well exercised against himself, as it may be so construed against the remainder-man in cases of defective execution, where the appointee is a creditor, purchaser, wife, child, or a charity ?

Doubts regarding the validity of defective appointments under powers to lease have been long entertained in the profession. Mr. Powell's\* observations upon this matter go to the extent of pronouncing upon both contracts to grant leases as also defective appointments under powers to lease, as void as against the remainder-man. A contract to lease, however, was not long subsequently to the publication of Mr. Powell's Essay enforced by Lord Redesdale† against the remainder-man. He was also of opinion that a leasing power ought to be construed as liberally as a power of jointuring. The progress of opinion upon the rights of lessees under contracts or defective appointments made with or by donees of powers to lease, seems to have strongly inclined towards the claims of lessees ; so that at the time of the passing of the 12 & 13 Vict. c. 26, little doubt was entertained that the Court would relieve against all defects of form. There does not appear to us to have been any foundation for the opinion that equity would not relieve any such appointments if defective. The ground upon which the doubts proceeded appears to have been that lessees at a rack-rent were not purchasers. This reminds us of the commercial fallacy, which the cultivation of political economy has happily exploded—that in every exchange or purchase one party loses and the other gains. The truth is, that both may lose or gain, and that, as a general rule, both do gain. Those who held that lessees at a rack-rent were not purchasers, ought to have held that the doctrine of specific performance put the Court of Chancery in motion for volunteers. It would have been not a very wise suggestion, if, when this branch of equity jurisdiction was springing up, the Chancellor told his

\* Essay on Powers, p. 389.

† (*Shannon v. Bradstreet*, 1 Sch. & Lef. 52.)

suitors that they must be fraudulent, inasmuch as if they had contracted to give the full value of the land sold to them, they should have been content with retaining their money, and leaving the vendor his land. The rights of lessees at a rack-rent under a power against the remainder-man should be considered stronger than if they had paid a fine, inasmuch as the consideration in the former case would more completely enure for the benefit of the remainder-man. There was thus no reason to contend against the equity of such lessees, on the ground that they were volunteers; and, while there was no decision against their claims, there were, on the contrary, very many dicta, if not decisions, in their favour. (*Vide Campbell v. Leach*, Ambl. 740; *Long v. Rankin*, Sug. Pow., App.; *Donnell v. Church*, 4 Ir. Eq. Rep. 630; *Doe v. Weller*, 7 Term Rep. 480.) Nevertheless, we find even in the present edition of Lord St. Leonards' work (p. 567) the following passage in relation to this question:—"The point is not concluded; but it may be thought that there is no sufficient ground, as undoubtedly there is no direct authority, for aiding a defect in favour of a mere tenant at rack-rent, although holding under a lease; much less can the relief be afforded to a tenant from year to year, holding under a parol or even a written contract. The part performance of the agreement by taking possession, &c., would not be material. Had an actual lease been granted, a defect in it could not have been supplied. The lessee, paying the full value for the estate, and that only during his occupation, cannot be put on the footing of a purchaser, who would sustain an actual loss if equity were not to interpose its aid. But where the lessee has expended money on the estate, he becomes a purchaser of the interest granted to him, and may well be held entitled to the aid of equity."

That a part performance would not confer upon the lessee a *locus standi* in a court of equity is a proposition which we altogether question. The donee of the leasing power is *pro tanto* the representative of the settlor, and has, to the extent of the power, all the control over the land the subject of the



settlement as the settlor had prior to his execution of that instrument. If the lessee would, after a part performance, be entitled to a decree for specific performance against the latter, if no settlement had been made, so also, we think, that he must be considered to have the same rights against the donee. Lord St. Leonards cites no authority in support of his statement on this point. He offers it thus unsupported as a proof of the more general proposition which we are here combating—that a lessee at a rack-rent is a volunteer. The argument of the noble author on this point, unsupported as it is by principle or authority, furnishes, as used by Lord St. Leonards, an example of an adroit *petitio principii*.

The law in respect to such defective appointments has been in a great measure set at rest by the Statute 12 & 13 Vict. c. 26. The preamble of this Act is likely to confine its provisions within a range short of all the mischiefs which it was intended to obviate. We have, therefore, considered an examination of Lord St. Leonards' views upon the matter not uncalled for, as they are retained in the present edition. Indeed, the enactment mentioned ought to have been considered almost unnecessary, considering the state of the authorities and the reason of the thing. The opinion of so eminent an authority as Lord St. Leonards, however, being against the equitable validity of defective execution of leasing powers, as regarded defects of substance, it had, doubtless, no inconsiderable influence in leading to the passing of the Act mentioned.

Lord St. Leonards thinks that this Act bears hardly upon remainder-men, in not giving them power to compel the lessee to accept of a lease made according to the terms prescribed by the power. The lessee may exercise a choice between his lease or a new one modelled according to the terms of the power. But the remainder-man has not correlative rights; he can compel the lessee to abide by the existing lease, unless he prefer one corresponding precisely to the terms of the power, but he cannot compel the lessee to accept a lease of the latter description. The noble author, consequently, thinks that the

**Act** is wanting in point of mutuality. We think that the **Act** is not open to this objection. Indeed, if it contained a provision conformably to Lord St. Leonards' view, it would have been a serious encroachment upon the freedom of contract. It would be an unfair law that would compel a lessee to accept a lease made according to terms which he never contemplated.

A comparison of the treatise before us with that of Mr. Chance reminds us of the distinction so ably illustrated by Schlegel, in his lectures on the Greek drama, between the classic and the romantic, as illustrative of the leading types of dramatic art. Lord St. Leonards' work aims at a classic symmetry and completeness very different from the indefinite details with which Mr. Chance's book is incumbered. The latter work, indeed, may be regarded as, in one sense, the Domesday Book of Powers. In it are noted, with great fidelity, all the cases, dicta, points, and theories, that had been given to the world prior to its publication. It is, however, unnecessarily and excessively prolix. Lord St. Leonards' work, on the other hand, avoids all unphilosophic and mere enumeration of particulars. We gladly pay our tribute of respect to the general display of learning patent throughout it. We consider, however, that it has some serious defects. The views of the noble author in respect to the suspension of powers, the extinguishment of powers simply collateral, the reservation of powers in deeds of bargain and sale, and covenants to stand seised, and the defective execution of leasing powers, appear to us to involve a sacrifice of the more general principles on which the doctrine of powers rests to certain technical theories of our real property system, which are unreal in themselves, and are, at all events, inapplicable to such juristical doctrines as are mainly founded upon ancient rules of equity. The style of Lord St. Leonards' treatise, moreover, is somewhat obscure. The first edition was, it is probable, hastily penned, and the subsequent avocations of its author prevented him from correcting its

abstruse generalities. It appears thus, although a modern work, to have much of the obscurity and complication of our older law books and reports—just as we sometimes find a building recently constructed, marked by the smoke and dust around with all the appearance of antiquity. The noble author has certainly done much to systematize and classify the principles underlying the numerous cases that relate to the subject of powers; but, although he has been thus observant of the unities of legal authorship, he appears sometimes to have forgotten that equity and intention have had a large share in moulding this branch of jurisprudence, and frequently intervene, (to return to our dramatic illustration,) like the chorus of the Greek drama, to deprecate the technical observance of the rules of law.

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#### ART. VII.—THE AFFAIR OF THE TRENT.

THOUGH the facts which make up the history of the *Trent* affair are now pretty accurately known, it is conceived that for future reference it may be useful to record them concisely in the pages of the LAW MAGAZINE. On the 7th of November, 1861, the *Trent*, an English Royal Mail contract packet, commanded by Captain Moir, with Commander Williams on board, in charge of Her Majesty's mails, left the neutral port of Havannah for the neutral port of Southampton. The *Trent* had numerous passengers on board, among them Messrs. Mason and Slidell, two Confederate Commissioners, proceeding on a mission to England and France from the Southern States, at present in secession from the United States. As the *Trent* was passing, on the 8th Nov., through the Bahama Channel, being in Spanish waters, abreast Paredon Grand Lighthouse, the *San Jacinto*, (Captain Wilkes,) an armed Federal frigate, fired a round shot across her bows. The *Trent* then stopped, and an officer, with a guard of armed marines, having boarded her, without making

any inquiry for despatches, demanded a list of the passengers, took out the Commissioners with their secretaries, M'Farlane and Eustis, by force, and removed them to the *San Jacinto*. The *Trent* then proceeded on her voyage to England. The two Commissioners with their secretaries were taken to a port of the United States, and kept in military custody at Fort Warren, in the State of Massachusetts.

The matter was, in due course, submitted to the law officers of the Crown, who returned that the seizure of the Commissioners by Captain Wilkes was an offence against the Law of Nations. A Queen's messenger was forthwith sent to Washington with despatches to Lord Lyons, the English Ambassador. During the negotiation, which resulted in the release and surrender of Messrs. Mason and Slidell, the following diplomatic correspondence between the English and Federal Governments took place:—

1. A letter, dated November 30th, 1861, from Mr. Seward, the American Minister of State, to Mr. Adams, the American Minister in London. This was written before Lord Lyons had alluded, even in conversation, to the affair of the *Trent*, and contains a statement that Captain Wilkes had acted without instructions from the Government.

2. A despatch from Earl Russell, dated November 30th, 1861, to Lord Lyons, containing, in firm but courteous terms, the demand of the British Government—viz., the liberation of the four gentlemen and their delivery to Lord Lyons, in order that they might again be placed under British protection, and a suitable apology for the aggression which had been committed.

3. A long letter from Mr. Seward to Lord Lyons, addressed from the Department of State, Washington, bearing date December 26th, 1861. The American view of the question was elaborately propounded in that document, and the whole concluded with an offer to give up the prisoners, but no reference was made to an apology.

The French Government, in a despatch, dated December 3, 1861, from M. Thouvenel, the Prime Minister of France, to

M. Mercier, the French Consul at Washington, delivered a protest against the violation of international law by Captain Wilkes, and urged the American Government to comply with the demands of Great Britain.

The above is a short and complete summary of the salient facts which will make the seizure of the *Trent* a memorable act in the annals of international law. Within the memory of those now living no public event has aroused the anger of the nation to so high a pitch. The massacres of the Indian revolt caused a deep emotion throughout the country, but the injury came from a people occupying an obscure status in the society of nations, and sunk almost beneath the level of civilized life. There we had only to inflict condign punishment, and mourn for the dead. This affront coming from our equals took the complexion of an affair of honour—a wrong to be redressed at all hazards, and without compromise, under the penalty of being scouted as a people devoid of spirit and self-respect by every civilized nation.

As to the character of the act in point of law, English jurists are quite agreed in the opinion that the decision of the law officers of the Crown was indisputably correct. That opinion was not the hasty generalization of men swayed by feeling, and determined to arrive at a foregone conclusion. Looking back on the comments in the legal press and political journals, no one can fail to perceive the dispassionate tone, as well as the learning and research which characterized that discussion. In a spirit of earnestness becoming the solemnity of the occasion, statesmen and lawyers instituted a diligent search for precedents, overhauled the forgotten dicta, and reported judgments of eminent Admiralty judges, and with severe impartiality tested the conduct of Captain Wilkes, by the principles therein authoritatively laid down.

The questions of international law raised by the capture of the *Trent* received a fair and thorough discussion in the two leading legal societies of the metropolis—viz., the Society for Promoting the Amendment of the Law and the Juridical

**Society.** Considering the importance of the subject, and the theories which have been propounded by American lawyers and statesmen, it is a fact of some weight and significance that in the opinion of both these learned societies, the conduct of Captain Wilkes was an unjustifiable aggression. The Juridical Society approached the subject in that philosophical spirit for which it deservedly enjoys so high a reputation. The paper read by Mr. C. Clark, from which we shall presently give some extracts, was written expressly to introduce the question, "Is the capture of the Southern Commissioners from on board the mail steamer *Trent* defensible by the Law of Nations?" Devoted to this limited inquiry, the principal cases decided in the Prize Courts are cited, and in illustration of the ruling maxims of international law, as laid down in the Commentaries of English, Continental, and American jurists. The Law Amendment Society, consistent with the policy from which it has not swerved during its long and useful career, took a broader and more practical view of the subject. In Dr. Waddilove's paper, "On the Conflict of Belligerent Maritime Rights," something more is contemplated than a decision upon the legality or illegality of the capture of Messrs. Mason and Slidell. It contains a concise account of the antagonistic policy of nations in regard to the right of search, the law of contraband and blockade, together with valuable suggestions for the adoption of some recognised international code of laws. Taken together, these two papers form a compendium of useful information on one important branch of the law of nations.

The conduct of Great Britain and other nations with respect to neutral commerce is summed up in the following historical sketch, and forms the introductory portion of Dr. Waddilove's paper:—

"The treaty of Utrecht, between England, and France (1713,) seems a convenient point to date from, because by that treaty the rights of neutrals at sea were first acknowledged and enunciated; and because on the terms of that treaty were based the commercial

relations between the chief maritime nations of Europe, and which have remained uncontroverted, save as they have been varied by treaties, or modified by judicial decisions. The words of that treaty applicable to my subject are (Art. 17,) 'And it is now stipulated, concerning ships and goods, that free ships shall also give a freedom to goods. That everything shall be deemed to be free and exempt which shall be found on board belonging to the subjects of either of the confederates, although the whole loading, or any part thereof, should appertain to the enemies of either of their majesties—contraband of war being always excepted.' Here we have the principle that 'free ships make free goods' clearly promulgated. When this treaty was abrogated by the war between England and France (1756,) England abandoned its provisions. She no longer maintained that 'free ships make free goods,' but, on the contrary, enforced the opposite doctrine with all her power and energy. She boarded neutral ships wherever she found them, seized and carried into her ports those which had on board cargo obtained from her enemies, and condemned them under the judgment of her Prize Court as legal capture. Her naval strength prevented any single nation from resistance. At length, in 1780, the Empress Catharine of Russia issued her declaration of remonstrance, asserting that 'free ships make free goods;' that all articles contraband of war are only such as are stipulated by treaty; that blockades to be acknowledged must be stringent and effectual. Sweden and Denmark at once adopted these maxims, and, in conjunction with Russia, formed a convention, known as 'the Armed Neutrality.' France, Holland, Prussia, and Spain, soon joined the league, and thus England had to withstand alone and unaided all the other maritime powers of Europe.

"But notwithstanding this coalition—this formidable array against her, England yielded nothing. With the same determination and marked success, she continued to seize neutral vessels with enemy's property on board, and confiscate them. The general peace of 1783 for a time laid the question at rest, until the war with France, consequent on the Revolution in 1793, again revived all the hostile feelings of the two nations. England again insisted on her right of searching and seizing neutral vessels with enemy's property on board. The armed neutrality was, at the instigation of Bonaparte, revived under the auspices of Paul, who had succeeded Catharine. England had again to contend single-handed with all the maritime nations of Europe, together with America, in support of her view of maritime law, and this she successfully did; and thus the doctrine 'that the property of an enemy found on board a neutral ship was lawful prize,' became firmly established in England's view of inter-

national law ; thus conflicting with the maxims adopted by the other powers of Europe and the United States of America, that 'free ships make free goods.'

"Another point of conflict was the rule of 'enemy's ships enemy's goods.' By the decisions of the English Prize Court, a neutral's property on board an enemy's ship was free from capture ; France, on the other hand, maintained that it was lawful prize.

"The long interval, from 1815 till 1854, during which England enjoyed the blessings of peace, lulled those conflicting doctrines ; but they only slumbered, the din of war might at any time rouse them into action ; but when France joined with England in the late war with Russia, it became necessary that those two nations should adopt one uniform rule in the exercise of 'Belligerent Rights.' It was therefore agreed upon by them, that France should relinquish her claim to pronounce as liable to capture 'the property of a neutral on board an enemy's ship,' and that England should abstain from deeming as a prize 'enemy's property on board a neutral ship.' Each nation also agreed to discountenance privateering, by not issuing any letters of marque. These mutual concessions tended much to simplify the law, to mitigate the evils of war as affecting the passive and unoffending neutral, and paved the way for the more comprehensive declaration of the Paris Congress, of April, 1856.

"Another subject of controversy was the right of neutrals to trade with the colonial possessions of an enemy. France insisted on that right, and during her wars with England invited and encouraged the commerce of neutrals with her West Indian possessions. This England would not permit. Her Prize Courts had, as far back as 1756, condemned that practice by a declaration of the principle, 'that a neutral has no right to deliver a belligerent from the pressure of his enemy's hostilities by trading with his colonies in time of war in a way that was prohibited in time of peace.' France, however, persisted in her adherence to her practice, and in 1793, in her war with England, openly invited neutrals to trade with her colonies. England immediately issued instructions for the seizure of all vessels bringing goods from, or carrying supplies to, the colonies of her enemies. During the short peace of Amiens, France, as was then her custom, again closed the ports of her colonies to all but her own vessels ; but when the war was renewed, she again threw them open to all who were not her enemies. England again seized neutral ships carrying on such trade, and her Prize Courts unhesitatingly condemned them ; and it is to be remarked that the *then* United States of America, through their eminent jurist, Chancellor Kent, coincided in opinion with England. Thus England and America



held views different to France on a very important principle affecting belligerent maritime rights. It may be said that the doctrine of free trade now prevents such a question being raised. Commercial policy may, however, again impose restraints on reciprocal trade. The conflict may again arise. 'The rule only slumbers in oblivion,' says Professor Wheaton.

"I must now advert to the Berlin and Milan decrees of Bonaparte, and our own orders in council of 1806 and 1807. When Hanover was occupied by Prussia at the instigation of the French Consul-General, a proclamation, emanating ostensibly from the King of Portugal, but virtually the act of Bonaparte himself, was put forth, declaring 'the ports of the North Sea, as well as the rivers flowing into it, closed against British shipping and commerce.' As a measure of retaliation, the English Government declared the mouths of the rivers Elbe, Weser, and Ems blockaded, and also laid an embargo on all Prussian vessels and property in the ports of Great Britain. Shortly afterwards a more comprehensive order was issued, declaring all ports between the Elbe and Brest blockaded—thus including the whole sea-board of the Western continent of Europe. This was derisively called 'the Paper Blockade.' Bonaparte was not remiss in retaliation on his part. He declared the whole United Kingdom of Great Britain to be in a state of blockade—that all commodities of English origin or belonging to Englishmen were good and lawful prizes, and that no ship from England or her colonies, or which should have touched there, should be admitted into any harbour of France, or any port occupied by her troops.

"This was followed on our part by another order in council, dated January 9th, 1807, whereby all neutrals were forbidden to trade with any port on the coast of France, and in November following a series of new orders were promulgated, by which we declared that we would permit no trade with France and her dependencies, except through England; all neutrals bound to these countries being required, in the first instance, to touch at our ports, and pay a duty to our Government, and that every vessel which had not a satisfactory certificate of origin should be declared lawful prize. To which edict France finally replied by what has been called the Milan decree, declaring in substance, that any vessel which in any way submitted to our orders of the 11th November, or which had been searched in the course of her voyage by an English cruiser, should be considered as lawful prize. (I have taken this graphic account of these decrees and orders from the *Edinburgh Review* for July, 1812.)

"The right of search and seizure to the extent claimed and exercised by Great Britain has not only caused much jealousy and hostile

feeling, especially between this country and America, but still remains unsettled. We have not only maintained our right of search for its original purpose of seizing an enemy's property on board a neutral vessel, but we have also asserted and enforced the right of searching American vessels and taking from them British seamen, or those supposed to be such. America, however, has resolutely resented this, and our war of 1812 was the consequence. When that was concluded, a treaty of peace was signed at Ghent, in 1814; but the question of searching neutral vessels for deserters from the ranks or ships of another state was not dealt with. Thus the question, whether it is a right, which England might again enforce, if it suited her purpose, is left in uncertainty; for, although we no longer impress men to supply our navy, still the declaration of the British Government in 1813 states, 'that it cannot be admitted that the taking British seamen from on board neutral vessels in time of war can be considered by a neutral state as a hostile measure or a justifiable cause of war.' How this assertion might have affected the case of the *Trent*, had she been adjudicated upon in an American prize court, might have been a matter of grave conjecture. But the release of the Commissioners and the avowal of the American Foreign Secretary, that he abandons the right formerly claimed by Great Britain, and adheres to the American view of the question, seems to determine the matter as far as the two nations are concerned."

Should the anarchy now raging in North America continue six months longer, the law of blockade must be seriously reconsidered by the maritime Powers of Europe. The policy of nations has hitherto been to afford belligerents every facility consistent with the well-being of those not implicated in the war, to determine, by some signal and speedy act, the question of superior strength. Hence it was expressly stipulated, in the treaty of Paris, that a blockade must be effective in order to entitle it to the recognition of neutrals. To respect an inefficient blockade is indirectly to commit an act of hostility against the belligerent whose ports may be blockaded. It answers the same purpose as a direct supply of ships to the weak blockading force. To the injury of one party the other is clothed with a borrowed strength. With the sanction of neutrals the capital which would have been sunk in maintaining an efficient marine is diverted to other channels. With

that surplus capital fresh troops might be levied, new forts might be built, and the whole operations of the war might be conducted on a grander scale. Thus, a passive neutrality might degenerate into effectual hostility; and it is impossible to resist the conclusion, that the non-observance of a fictitious blockade is an act of common justice to the parties,—an act of duty to the rest of the world.

What constitutes an efficient blockade is a matter of fact to be determined according to the circumstances. It has never been considered necessary that a cordon of blockading ships should line the whole extent of the coast, and be actually present at every point of it. But the force must be so strong as substantially to prevent ingress or egress at any of the closed ports.

Neutrals bind themselves to respect a blockade while it preserves the character of a *bonâ fide* trial of strength, and no longer. The language of nations looking on is virtually this,—let the strongest prevail and bring the contest to a close with all speed by some unequivocal proof of superiority. The sinking of the stone fleet in the mouth of Charleston harbour, besides being a wanton and unheard-of barbarity, has been regarded by some as a constructive avowal of the inability of the Northern fleet to keep up a substantial blockade of the ports of the South:—

“The maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Again, a knowledge, or a fairly presumed knowledge, of the act of blockade, must be established against the vessel breaking it before she can be condemned as prize. Again, it is somewhat uncertain what will constitute the termination or legal suspension of a blockade. These are some of the salient uncertainties which surround the question of blockade. The subject received much consideration, both in the Admiralty Court and the Privy Council, during our late war with Russia; and the result of their decisions is given in Dr. Deane’s able treatise on ‘The Law of Blockade.’

“But before quitting this part of my subject, I must allude to the present blockade of the southern coast of America by the Federals.

It cannot for a moment be contended that the Federal vessels employed in that service are sufficient to complete an effective blockade of nearly 2000 miles of coast. England and France have acknowledged and respect that blockade; how far and how soon they would be justified in raising it might be a difficult question to be determined in the American prize court. But another matter here suggests itself—viz., the intended destruction of the access by sea to Charleston. We read that by sinking old vessels laden with huge masses of granite, the Federal Government will succeed, by reason of the currents and shifting sand, in completely sealing for ever the channel by which Charleston has hitherto been approached. This is certainly a novel process of blockade, and a serious injury to neutral commerce. But is it such an act as other states may forbid or resent?"

The moot questions, whether the whole system of blockade (except for purposes strictly military) and the confiscation of private property on the high seas, should be discontinued, are not grappled with in either of these papers. These propositions involve, beyond doubt, a radical modification of the present theory of war. Some of the most palpable consequences of such a change would be, on the one hand, to secure for belligerents, as well as for neutrals, those physical enjoyments which accompany commercial prosperity; on the other hand, to diminish the importance of maritime superiority, and to make the issue of a war depend more and more upon actual loss of life. In a paper read by Mr. O'Hagan, at the Dublin Meeting of the Social Science Association, that gentleman argues with much force that all private property whatsoever, (except contraband of war,) should be safe from capture at sea:—

"Even when the old laws of maritime warfare were in force," observes the writer, "I might ask to be pointed out a single instance in history in which the suffering arising from interruption to commerce was the really determining motive of peace. Wars are gigantic trials of strength between nations. The collective force of the one meets the collective force of the other, and after contests, short or long, one is found the weaker and succumbs, or both are exhausted, and it is upon the whole something of a drawn battle. But when nations thus wrestle, it is the *fall* that tells, not the scratches and pinches of the fight. If ever this was strikingly exemplified, it was in the great war to which I before referred. The English Govern-

ment asserted, as I said, the extreme of belligerent rights against commerce, which led of course to their being equally exercised on the other side. Napoleon, on the other hand, by the Berlin and Milan decrees, and the British Government, on the other, by their orders in council, waged against each other's commerce a war of positive extermination; and Napoleon, as is well known, was convinced that his command for the exclusion of English manufactures from the Continent would ultimately force a people so mercantile to peace. Yet, on the one side and on the other, these measures provoked exasperation and retaliation, but if anything had effects directly contrary to peace. It never occurred to the English people to give up the war by reason of the decrees against their trade; and, on the other hand, although the victory of Trafalgar was said to have swept French commerce from the seas, Napoleon remained what Austerlitz had made him—lord of Europe—until he was overthrown by the outraged sentiment of Europe. And was the last war in any degree brought to a close by Russian merchantmen being dragged into French or English ports? It was finished by no attacks on trade, but by the capture of the Malakhoff.

“What advantages then, it may be asked, has a great maritime power if it is to be restrained from beating down the enemy's commerce? Enormous advantages both for offence and defence. Is it nothing to have its own coasts secure while it is free to assail others? Consider the power of transporting troops to any quarter of the globe at will, fresh and unharassed by a march. Consider the practical dominion over the islands of the deep which maritime supremacy confers, and the State which possesses it may well be content to forego such petty prey as cargoes of hides and corn.

“As to the argument that the danger to their property indisposes mercantile men to war, and so leads to the continuance of peace, I must frankly say I disregard it. If a just cause of war has arisen, then it is an evil and not a good that men should be over-pacific in their dispositions. But apart from all that, how can we countenance the principle that war is to be made uselessly cruel in order that men may have the greater fear of it? See where that would lead us. Back, step by step, to all the barbarities from which mediæval chivalry and modern wisdom have combined to release us; back to the slaughter of prisoners; back to the capture of private citizens and the subjection of them and their families to slavery. No!—after all possible alleviations, war will still remain awful enough for all the sober apprehensions of reasonable men.

“In all this, of course I exclude contraband of war. Those who carry weapons and munitions of war to troops engaged in fighting

are themselves engaged in fighting. Mr. Smith, of Liverpool, and Monsieur Planchet, of Bourdeaux, exchanging wine and cotton, are in a very different position from the same gentlemen shipping cannon and gunpowder for the use of their respective armies and navies.

"Neither do I think the right of blockade as now settled should be interfered with. It is clear that a blockade is not an assault on commerce merely; it may be a means of effective aggression upon the enemy's territory, and is often used in combination with the operations of land forces. I do not know how belligerent nations can be expected to deprive themselves of such an arm.

"But as to the main proposition, that private property upon the high seas should be secure, it will, I am convinced, be one day decreed by the great Powers of the world. The civilized intelligence of man has taught him that war as a duty is to be carried on like all duties, in no vindictive or cruel spirit; that every injury to his enemy not commanded by the great end in view, is a crime; and that if his blow be strong he should in all beside be gentle, in the spirit of the old French adage—

" 'Bon chevalier, n'en doutez pas  
Doit frapper haut et parler bas.' "

With regard to the *Trent* affair, the following novel questions might have been raised had that vessel been taken into an American port, and subjected to adjudication in a prize court:—

"1. Did the fact of the *Trent*, having on board the mail bags containing letters and other means of correspondence affecting the interests of neutrals, place her, with reference to a belligerent, in a different position to that of an ordinary neutral merchant ship?

"2. Did the fact of there being on board the *Trent* an officer holding Her Majesty's Commission in charge of the mails raise her character above that of an ordinary steam-packet?

"3. Has the fact of the British Government having recognised the Confederates as belligerents, and acknowledged the blockade by the Federals, established such a state of war between them as to invest both or either with all the rights and privileges of belligerents?

"4. Have the Federals a right to treat the Confederates as rebels, seeing that they have blockaded their ports and have notified the same, but have made no declaration of war?

"5. Could Messrs. Mason and Slidell be dealt with as despatches, seeing they were commissioned for a political, but hostile purpose from the Confederates to two neutral Powers?

"6. Did the fact of the Confederate Commissioners having run the blockade of Charleston, and then proceeded from one neutral port, whither they went for the purpose of their voyage, to another neutral port where were agents of their own country, place them in a different position to that in which they would have stood had they being going direct from Charleston to Europe ?

"7. Could they be deemed ambassadors going from one country to another, seeing that the Confederate States have not been directly established as independent territory ?

"8. Does the precedent of our having taken British seamen out of American vessels bear on the subject ?

"9. If the *Trent* had been taken into an American port, would a prize court have had jurisdiction over her, seeing there had been no declaration of war on the part of the Federals, and that they had not acknowledged the Confederates as an independent State, or as a belligerent Power, save by the blockade of their ports ?

"10. Does our having taken seamen out of American vessels, or the burning of the *Caroline*, in the Canadian rebellion, or the capture of Mr. Laurens by the *Vestal*, or our taking Terence M'Manus from an American vessel when in English waters, afford any justification for the conduct of the *San Jacinto* ?"

The question of international law raised by the capture of Messrs. Mason and Slidell is briefly this:—Is it lawful for the captain of a belligerent ship to take from on board a neutral mail packet, proceeding on an innoxious voyage to a neutral port from a neutral port, the persons of Commissioners going on an embassy to neutral countries? This involves three subordinate inquiries—1st. Into the character of the ship. 2nd. The nature of the cargo. 3rd. The destination of the voyage.

The *Trent* was a neutral mail packet. International law confers on mail ships special immunities. Mr. Beach Lawrence observes (Wheaton's Elements, Beach Lawrence's Notes, book 4, c. 3, p. 565, 6th edition):—

"The preventing of neutrals bearing enemy's despatches is included with the seizing of articles of contraband, as an exception to the otherwise unrestrained freedom of commerce, conceded to them by the 'declarations' of England and France, and by the order in council of the 15th of April, 1854. It is conceived that the carrying of despatches can only invest a neutral vessel with a hostile

character in the case of its being employed" [specially engaged] "for that purpose by the belligerent, and that it cannot affect with criminality either a regular postal packet, or a merchant ship which takes a despatch in its ordinary course of conveying letters, and with the contents of which the master must necessarily be ignorant. This view, it is supposed, is not inconsistent with the text, which refers to a fraudulent carrying of the despatches of the enemy. Since the former European wars, some Governments have established regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; while, in other countries, every merchant vessel is obliged to receive, till the moment of its setting sail, not only the despatches of Government, but all letters sent to it from the post office."

Hautefeuille lays down the law in the same way (*Hautefeuille, Droits des Nations Neutres*, vol. 2, p. 463):—

"Despatches may be carried from a neutral port to another neutral port, or from a neutral port to a port belonging to the belligerent, or from a port of the belligerent to a neutral port; or, last of all, from a port of a belligerent to another port under the same sovereign, or occupied by his arms. It seems clear that the first three hypotheses must be left out of account. Whenever the starting point, or the point of arrival, is a neutral country, the transport of the despatch is innocent, and the neutral, in taking charge of it, does not violate the duties of neutrality, and commits no act of contraband. Even in the last hypothesis, where the despatch is sent from a place belonging to the belligerent to a port also belonging to him, it is necessary to make some observations. One of the belligerents having an important despatch to send to a remote part of its territory, to a colony, to a fleet stationed far from the mother country, may freight a neutral vessel specially to carry this despatch. But it may happen, also, and this is the most frequent case, that this letter is put on board a neutral vessel charged with a regular post specially devoted to the carriage of letters, not only of the State but also of private individuals, and performing this service not only under special circumstances, but at regular stated periods. The packet boats are vessels of this sort. It is usual among commercial nations that at the moment when a merchant vessel sets sail from a distant port the captain is charged by the post office with all the letters destined for that place and the adjoining parts. The captain cannot refuse this mission without violating his duty; he is intrusted with and responsible for the despatches confided to him. The belligerent may use



this means of sending his despatches. Is the neutral vessel equally guilty in these last three hypotheses? In the first case he is certainly so. It is clear the captain cannot be ignorant of the service he is called on to fulfil. Having freighted his vessel to one of the belligerents specially to carry a despatch from one of his ports to another, he is guilty of a violation of the rights of neutrality and may be treated as a belligerent; but when the transport of the letters and despatches of belligerents is made either as a postal service by regular packet boats, or according to the immemorial usage of maritime people, who before the establishment of special boats always deposited their public and private despatches in the first boat, it is a perfectly innocent act and can in no case be considered either as an infraction of the duties of neutrality or as an act of carrying contraband. Suppose, for instance, a war was to break out between the United States and England: the English Government freights a French vessel in an English port specially to carry a despatch to the governor of any of the English West India Islands. Whatever be the contents of this despatch, the ship has violated the duties of neutrality and may be treated as an enemy by the Americans. But would it be the same if the ship, laden with merchandise and having a purely commercial object and bound for the West Indies, received this despatch at the moment of its departure along with the rest of the correspondence? Certainly not. The captain has not accepted a special mission from the belligerent, but has only rendered to him, as a friend of his country, a service, which it is not in the habit of maritime usage to refuse; a service, too, which he would equally have rendered in time of peace, and which he can render, notwithstanding the war, without violating any of the duties of war. I never can believe that any nation at war with Great Britain will be able to consider as an act of hostility the transport of the India mail by the French packet boats in the Mediterranean, although we may really look on this mail as directly put on board in an English port and directed to another English port, since it passes through France closed and escorted by an English courier, who is responsible for it."

The second ingredient is the nature of the cargo. In the language of Mr. Seward, "Were the persons named and their supposed despatches contraband of war?" Upon this issue the American War Minister stakes the whole controversy. The flimsy expedient of deducing legal principles from etymological analyses will be considered a poor substitute for precedents and

authority. We search in vain for a single case in the reports or in Mr. Seward's despatch establishing the proposition that ambassadors on a voyage to a neutral port are contraband of war. They all point the other way. There are two remarkable cases, specially deserving of notice, to which no answer has yet been given. They are not cited in either of the papers from which we have quoted at such length, but attention was called to them in the early stages of the discussion upon the *Trent* affair by an able writer in one of the leading journals.

The cases referred to are the *Imina* (3 Rob. 167) and the *Hendric and Alida* (Minot's edition of Hay and Mariott's Decisions, Boston edition, p. 94.) The *Imina* sailed July, 1798, with a cargo of ship timber from Dantzic, originally for Amsterdam, but was going at the time of capture to Embden, in consequence of information of the blockade of Amsterdam. In giving judgment, Sir W. Scott made the following observations:—"The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto*, in the actual prosecution of a voyage to an enemy's port." . . . "Goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful." The *Hendric and Alida*, a Dutch brig, laden with powder, guns, and having five military officers on board, was sailing from a neutral country to St. Eustatia, a neutral port, when she was captured by the *Ardent*, an English ship under Lord Mulgrave. The military officers bore commissions in the rebel (American) army, granted by Franklin, who was then residing in Paris as a Commissioner of the American States. Sir George Hay decreed that the ship and cargo should be restored, on the express ground that, although laden with contraband, she was a neutral ship sailing to a neutral port. "It would be too high for any such court of justice as this to assert that the Dutch may not carry in their own ships to their own colonies and settlements everything they please, whether arms or ammunition, or any other species of merchandise, provided they do it with the permission of

their own laws; and if they act contrary to them, I am no judge of the laws of Holland.”\*

In the paper read before the Juridical Society, Mr. Clark maintains the following propositions:—

“1. That a ship is, as a rule, part of the soil of the country to which it belongs.

“2. That that rule is subject to certain exceptions, one of which is, the right of a belligerent ship to search it, though a neutral, for contraband of war.

“3. That it has the general right of freely sailing over the seas, carrying cargo, papers, and persons—but this cargo must not be contraband—nor must the neutral vessel engage itself to do the service of a belligerent transport in the conveyance of persons or papers between the belligerent mother country and its colonies, for, in such a case, being employed in the belligerent service as a transport, it may lawfully be treated as a belligerent transport.

“4. That where a neutral vessel is *bonâ fide* pursuing its ordinary employment between a neutral and a belligerent country (*à multo fortiori* where it is doing so between two neutral countries, as in this case) the fact that the vessel has received on board, in the ordinary way, as casual individual passengers or papers the officers or the despatches of one belligerent, will not authorize the other belligerent to stop and search it nor to take the persons or papers from on board it.

“5. And, consequently, as this is the act that has been done by the *San Jacinto* in the case of the *Trent*, that the act is not defensible by the law of nations.”

#### “SHIP PART OF THE STATE TO WHICH IT BELONGS.

“Peace is, in law—I wish it was in fact,—the normal condition of the world. One of the great material blessings of peace is the free intercourse of the various parts of the world, and the free interchange of their commodities. For such a purpose the sea is open to all—it is the property of no one; it is truly described as ‘the highway of nations.’ But there must be something of rule in the use of this highway, or the benefits which its use ought to produce to all might be liable to be lost, if not even perverted into mischiefs. As a first

\* Admitting, therefore, Mr. Seward's doubtful proposition, that the Commissioners on board the *Trent* were contraband, as much so as powder and shot or military officers, it is here established that they were divested of that character by the mere fact of their going in a neutral ship to a neutral port.

rule, each nation claims jurisdiction over its own vessels at sea. This rule is as ancient as navigation itself, though all its applications may not have been early developed. This rule depends on the principle, that every vessel is part of the state to which it belongs. This principle I am prepared to maintain, and must do so, for it will become of much importance in a future stage of this discussion—and it has been doubted; as it seems to me, on very insufficient reasoning, by some writers on international law. Manning, in his *Commentaries on the Laws of Nations*, 209, says, that ‘this position has been relied on by writers who have claimed that the flag of a neutral shall protect the goods of a belligerent.’ If such was the only purpose for which the doctrine was to be maintained, it would not have my support, but my opposition, since I believe that such an unqualified doctrine would receive an unqualified application, and would thereby only lengthen war and make it more disastrous. The doctrine, that the ship is part of the state to which it belongs, has, however, other consequences not only not objectionable, but absolutely just and praiseworthy. Let us see how Mr. Manning, who has put together the objections of other writers, assails it. He says: ‘The argument is based on the fact that a belligerent has no right to capture the property of his enemy when in the territory of a neutral. It is asserted that the ship is part of the territory of the state to which it belongs; and that goods on board a neutral ship are, therefore, as exempt from capture as if they were actually in the neutral country itself.’ To draw too wide an inference from a doctrine can never be admitted as a sound and proper means to impeach the doctrine itself. This has been done in the sentence just quoted, and the same fault of reasoning will be found to run through the whole argument. He goes on thus:—‘To argue that a neutral ship is neutral territory is a fiction so palpable that it appears surprising that it should ever have been insisted on as a tenable position, especially as only one argument is adduced in support of this territoriality of ships at sea. The jurisdiction of the state to which a ship belongs extends to the cognizance of acts committed in that ship while at sea; and it is urged that this continuance of jurisdiction proves that a ship at sea is part of the territory to which it belongs. This deduction seems, in the first glance, far fetched and too flimsy to be made the basis of any serious conclusions. But more than this, it meets with contradiction on its own terms; a ship, say the asserters of this proposition, is part of the state to which it belongs, as is evident, because at sea the ship is subject to its jurisdiction.

“‘Now, no nation has jurisdiction over the territory of another nation, but as soon as a merchant ship comes into the harbour of a

state to which it does not belong, it becomes subject to the jurisdiction of the latter state. This shows that a merchant ship cannot be considered part of the territory of its own state, for if it possesses this character at any time it must possess it at all times. . . . The fiction is completely destroyed by the disproof above alleged, but other reasons combine to show how little tenable is this position. If a ship is part of its state's territory, it cannot be allowed to take from the ship contraband of war going to an enemy, because such capture would not be permitted if the contraband goods were lying in the neutral territory. Again, if neutral ships carry the soldiers of our enemy, it would not be allowable to make them prisoners, because we must not attack the territory of a neutral. Either the argument is worth nothing or it holds to this extent, which is a *reductio ad absurdum*. To escape contradiction, the right of search and of seizing contraband must be denied, if the right to protect enemy's goods is claimed on this ground.' These last words perhaps explain Mr. Manning's real objection to the doctrine; but if so, they show that he commits the error of objecting to a principle because of a deduction sought to be made from it. The principle may be sound—the deduction illogical. The maxim, that there is no rule without an exception must be applied here, and we all know that an exception often affords very valuable proof of the existence of the rule. Is it true that a law does not exist in one country because it, partially or wholly, loses its effect in another? What is the conflict of laws but the acknowledgment that there is a law in one jurisdiction which another is not bound entirely to obey, but which it always treats with respect, often tolerates, and sometimes effectuates. What is the comity of nations but the principle of concession, as far as practicable, to the authority of a foreign jurisdiction. A ship in a foreign port is part of the territory to which it belongs, so far as the municipal laws of the port where it is do not interfere to deny it that character. Where they do so interfere, of course the superiority is with them; where they do not so interfere, the laws of the country of the ship apply to it. And still more strongly is this the case when the ship is not in port, but is at sea. The sea is the highway of nations, and on that highway the rights of all voyagers are *prima facie* the same. If the ship of one country interferes with the ship of another upon the high sea, the interference must be justified, or compensation must be afforded. In the case of a private wrong, the tribunals of the country of the wrong doer are bound to afford redress. In the case of a public interference, the Government of the interfering country is under a like obligation; it must explain and justify the conduct of its officer, or it must repair his wrong or his

error. If, the moment a vessel was on the high seas or in a foreign port, it became an isolated thing, unconnected with the country to which it belonged, it would be without any protection. It is because it continues part of the soil of that country that it can sail in safety, for it then comes within the protecting power of that country. It is equally true of every individual of a country as of every ship of a country, that when he enters a foreign port he is bound to submit to the laws of the place, that he can no longer protect himself by the laws of his own country, nor even carry on his business with relation to them alone, since his contracts, made in a foreign port, may be modified by the laws of that place, and yet he is undoubtedly still a part of his native community, and, as such, is entitled to certain advantages, to fair respect, and to necessary protection. The ship is always part of the country to which it belongs, though it does not follow as a consequence that it is everywhere, and at all times, to be treated as the land of that country itself. Such a consequence is, by the very nature of things, impossible, and hence the laws of the place where the ship is found possess the superior authority, and the justifiable necessities of self-preservation on the part of any belligerent should it be met with on the high sea create exceptions to what is otherwise a clear and properly established rule."

#### "ENGLISH CASES.

"In the first of the English cases to which I shall refer, the principle on which, supposing the *Trent* to be a mere merchant vessel—an ordinary seeking ship—ready to take any employment, from anywhere to anywhere, and carry anything (which certainly was not the case with the *Trent*)—would be liable to condemnation—is laid down. The argument, of which, unfortunately, not even a sketch is given, must have presented an extreme case in proof of the general danger or inconvenience of conceding the condemnation of the particular vessel; and Sir W. Scott notices and answers such an argument. The case was this:—

"The *Friendship*, an American vessel, (6 Rob. Adm. R. 420,) carried a small quantity of goods pretending to be a cargo, (most of the witnesses, the French officers themselves, the persons carried and captured, declared that there was no cargo on board,) and also carried soldiers and sailors, the crews of two lost vessels. The contract to carry them was made by the French Government agent, and the men were subject, on board, to military discipline, and were under orders to present themselves to the military authorities at the first port at which they should arrive. Held, that the vessel was really engaged as a transport vessel in the French service, and so

condemned. On the subject of carrying passengers Sir W. Scott says, p. 426, 'It is asked, will you lay down a principle that may be carried to the length of preventing a military officer in the service of the enemy from finding his way home in a neutral vessel from America to Europe? If he were going merely as an ordinary passenger or as other passengers do, and at his own expense, the question would present itself in a very different form. Neither this Court nor any other British tribunal has ever laid down the principle to that extent. This is a case differently composed. It is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's Government, to convey a number of persons, described as being in the service of the enemy, with their military character travelling with them, and to restore them to their own country in that character.' These circumstances, taken altogether, gave to the vessel the character of a mere French transport, and occasioned its condemnation. 'Is it not ludicrous to speak of the cargo of this vessel as being any other than these passengers for whom the ship was freighted? I am of opinion that this vessel is to be considered as a French transport. It would be a very different case if a vessel appeared to be carrying only a few individuals, invalided soldiers, or discharged sailors, taken on board' by chance, and at their own charge. I am satisfied that they are still as effective members of the French marine as any can be.' The plain inference from the words of Sir W. Scott is, that had the vessel been engaged in the prosecution of an ordinary voyage, and had these persons come individually on board as private passengers, the vessel would not have been condemned. But here was a vessel with no cargo, with no employment but that of carrying troops, subject during her voyage to military discipline, the contract to convey them being made by a French Government agent, and the officers and men being under orders to report themselves to the military authorities at the first port they reached. What was, what could this vessel be, but an ordinary transport ship? Let us now proceed to the next case:—

"The *Orozembo*, (6 Rob. Adm. Rep. 430,) American vessel chartered ostensibly by a merchant in Lisbon 'to proceed in ballast to Macao and there to take a cargo to America.' Ship fitted up for the reception of three military officers of distinction, and two persons in the civil department of the Government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the Government of Holland. England and Holland (which was at that time under French authority) were at war. The point made here was that the master could know nothing of the character of his

passengers, a point not affecting the law of the case, but most important on the question of fraud. Sir W. Scott answered, that by reference to the facts, which in his opinion showed that the voyage was altogether undertaken for the purpose of carrying these persons to their destination, the number he held not important—one general might be of more importance than a regiment—there was no cargo—going to Macao was a pretence. All the passengers said they were going to Batavia. Though there was no cargo, there was a provision in the charter-party that ‘the master should receive the freighter’s supercargoes on board.’ One of the passengers, a French gentleman and a general of brigade in the Dutch army, was examined. He said, ‘he left the Hague in February, by the direction of the Government of Holland, which ordered him to proceed to Lisbon, and informed him that he would there find a neutral ship chartered to carry him to Macao; that the destination was Macao, and that the master was not privy to an ulterior destination, but that, if the master had refused, he should have compelled him to go to Batavia.’ The charter-party itself contained a stipulation that the voyage might be put an end to in India, if the supercargo pleased. There was no evidence of any supercargo except those previously ordered to be received on board. Sir W. Scott considered the vessel under all these circumstances to have no other character than that of a transport engaged in the enemy’s service, and so condemned it. Is it possible for any one to doubt the justice of these decisions, is it possible for any one truly to charge them with that exclusive ‘high handedness,’ that it has been the custom among those not mindful of the facts, to impute to the acts of the English vessels and the judgments of the English Prize Court? If national neutrality had been a private contract, would not the evidence in these cases have justified—nay, required—an award that it had been broken?

“Let us now pass to a third case decided by the same learned judge within a short time afterwards, and reported in the same volume. This case is one which has been of late so often referred to and so much misapprehended, that it requires a more detailed statement. It is the case of the *Atalanta*. (6 Rob. Adm. 440.)

“This ship was an American vessel which had been purchased by a subject of Bremen in the Isle of France (an enemy’s colony) to supply the place of a former vessel, which had been sold there after being wrecked. It might, therefore, be considered a neutral ship. It was on a voyage from Batavia (an enemy’s colony) to Bremen (a neutral port.) The chief supercargo was an American, who had been both at Amsterdam and Paris just before going out on this voyage, and his correspondence was found, containing propositions



for an adventure, which the prudence of the neutral manager at Bremen had induced him to decline. Sir W. Scott evidently thought that this supercargo's whole conduct indicated the intention of serving the purposes of the enemy. The vessel was detained ten days in the Isle of France by the Government, as both supercargoes said, 'without any reason being assigned.' In a part of the luggage of the other supercargo were found, concealed, papers which proved to be despatches from the Government of the Isle of France to various departments of the French Government, containing important military information. These papers, though concealed in a chest of the supercargo, were, upon the arrival of the vessel at Bremen, 'to be delivered to Colonel Richemont, an officer of artillery, on board, and second in command at the Isle of France, though he appears to have shipped himself as a planter, and as an inhabitant of the Isle of France, for the purpose, it is said, of avoiding imprisonment in case of capture.' The despatches were also to be delivered to Colonel Richemont 'on the appearance of a strange cruiser.' On occasion of the appearance of a Piedmontese cruiser they were so delivered. This was the evidence of the supercargoes. The master spoke of it as a matter of notoriety that the vessel had been detained by the order of the French Government in order to take on board the packet which was delivered to the supercargoes. Sir W. Scott goes through all the facts, and combines and contrasts the various passages in the affidavits and in the letters of the parties, and then says, 'What might be the consequence of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple fact of carrying despatches between the colonies and the mother country of the enemy is a service highly injurious to the other belligerent, is most obvious.' . . . 'How is intercourse with the mother country kept up in time of peace? By ships of war, or by packets in the service of the State? If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character.' . . . 'It has been laid down by the Superior Court in the *Constitution* that the fraudulent carrying the despatches of the enemy is a criminal act, which will lead to condemnation.' He afterwards calls it 'an interposition in war,' and says that in this case 'it was active interposition in the service of the enemy, concerted, and continued in fraud,' and so, treating the vessel as engaged in the transport service of the enemy, he pro-

nounced for condemnation. In the course of his judgment he indicates, though he does not exactly declare, that to make the carrying of despatches even under such circumstances as existed here a cause of forfeiture, 'it is necessary to show a military tendency.' It is plain that such was the inclination of his mind, for he refers to the case of the *Sally*, where the principle was not applied, the despatches relating only to the supply of corn in a year of great scarcity; and he afterwards notices that the despatches in the case then before him were 'entirely military.' And finally, these were despatches not sent from an enemy's country to a neutral country to be used by or for the business of the neutral country, but were entirely to be used in and by the enemy-country. This deprives the case of any authority to justify the act of the *San Jacinto*, for it was a simple service of war, and there was no right or interest of the neutral country affected by the stopping of these despatches. We shall see in the next case that that circumstance is one which materially affects the question. That which has just been referred to is the strongest case on the subject of despatches, and it is clear that Sir W. Scott looked on it as one of a neutral ship wilfully engaging in the service of the enemy, to perform a service which was really an interposition in the war, and that the fraudulent manner in which the service was attempted to be effected was decisive as to the intention of the parties and the nature of the transaction.

"This case was shortly afterwards followed by that of the *Caroline*, and there Sir W. Scott takes occasion to explain what might have appeared too stringent in the previous judgment, and what had, perhaps,—for the argument not being reported we can only guess upon the matter,—been pressed with too much urgency upon him, by one side as a legitimate consequence of his previous judgment, or by the other put forward as an improper and injurious though necessary result from it. The *Caroline* (9 Rob. Adm. Rep. 461) was the case of an American vessel carrying despatches from the French Minister in America to the French Government in Paris.

Sir W. Scott, in this case, uses the phrase which, taken apart from the rest, has been so much relied upon:—'It is the right of the belligerent to cut off all communications between the enemy and his settlements.' But he thus goes on to give the true meaning of that phrase: 'The Court has before had repeated occasion to express its opinion that the carrying the despatches of the enemy, from the colony to the mother country, is a criminal interposition in the war that will lead to condemnation. In this case a distinction was taken, very briefly in the original argument, which I confess struck me very forcibly at the moment, that carrying the despatches of an

ambassador, situated in a neutral country, did not fall within the reasoning on which the general principle is founded.' 'This is not a case of despatches coming from any part of an enemy's territory '[to another part ought here to be introduced, the sentence goes on thus—]' whose commerce and communication of every kind the other belligerent has a right to interrupt.' Now as this is plainly not true with respect to communication between a belligerent and a neutral country, the words I propose to introduce are plainly required, in order to express the real meaning of the speaker. 'They are despatches from persons who are in a peculiar manner favourite objects of the protection of the law of nations, ambassadors, resident in a neutral country. On these grounds a very material distinction arises, with respect to the right of furnishing the conveyance. The former cases were cases of neutral ships carrying the enemy's despatches from her colonies to the mother country. In all such cases you have a right to conclude that the effect of those despatches is hostile to yourself, because they must relate to the security of the enemy's possessions; and to the maintenance of a communication between them; you have a right to destroy those possessions and that communication, and it is a legal act of hostility so to do. But the neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility towards you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of that neutral state, that it will not favour nor participate in such designs, but as far as its own councils and actions are concerned will oppose them. And if there should be private reason to suppose that this confidence in the good faith of the neutral state has a doubtful foundation, that is matter for the caution of the Government, to be counteracted by just measures of preventive policy, but is no ground on which this Court can pronounce that the neutral carrier has violated his duty by bearing despatches which, as far as he can know, may be presumed to be of an innocent nature, and in the maintenance of a pacific connexion. One material ground, therefore, is wanting, on which the judgment of the Court proceeded in the former cases. Another distinction arises from the character of the person who is employed in the correspondence. He is not an executive officer of the Government acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it.

"I have before said that persons discharging the functions of

ambassadors are, in a peculiar manner, objects of the protection and favour of the law of nations. The limits that are assigned to the operations of war against them by Vattel and other writers upon those subjects are, that you may exercise your right of war against them wherever the character of hostility exists. You may stop the ambassador of your enemy on his passage, but when he has arrived, and has taken on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested.'

"He then remarks on the possible importance of preventing intercourse, and says :—'It is to be considered, also, with regard to this question, what may be due to the convenience of the neutral state, for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration that an ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there without the opportunities of such a communication? It is too much to say that all the business of the two states shall be transacted by the minister of the neutral state resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent states, and the use and convenience of an immediate negotiation with them.'

"He then notices the argument that such a privilege of free communication may be liable to great abuses—he admits that, and illustrates it by the practice of sending the private letters of intriguing men, and still more of intriguing women, but does not admit that this liability to abuse puts an end to this necessary privilege. He goes on thus :—'It has been argued truly that, whatever the necessities of the negotiation may be, a private merchant is under no obligation to be the carrier of the enemy's despatches to his own Government. Certainly he is not; and one inconvenience to which he may be held fairly subject, is that of having his vessel brought in for examination, and of the necessary detention and expense.' And this was the sole extent to which in his opinion liability had been incurred in this case. The ship and cargo were restored on the payment of the captor's expenses. The value of one opinion stated to have been given on the other side of the Atlantic may be ascertained by this circumstance, that in that opinion, which affects to be founded on this very decision, it is said that the ship was condemned."

## "CASES OF ARREST OF PERSONS.

"The cases of the Marquis of Belle Isle, of Mr. Laurens, of Lucien Bonaparte, and of Mr. M'Manus, have been referred to as justifying the arrest of the Southern Commissioners. Not one of them does so. The first is that of a minister sent from France to the King of Prussia, whose postilion by ignorance took him into the territory of Hanover, with whose Government France was then at war. As to that case, Vattel, bk. 4, c. 7, s. 85, says—'What we have here observed relates to nations that are at peace with each other. On the breaking out of a war we cease to be under any obligation of leaving the enemy in the free enjoyment of his rights; on the contrary, we are justified in depriving him of them, for the purpose of weakening him, and inducing him to accept of equitable conditions. His people also may be attacked and seized wherever we have a right to commit acts of hostility. Not only, therefore, may we justly refuse a passage to the ministers whom our enemy sends to other sovereigns, we may even arrest them if they attempt to pass privately, and without permission, through places belonging to our jurisdiction. Of such a proceeding the last war furnishes a signal instance. A French ambassador, on his route to Berlin, touched, through the imprudence of his guides, at a village within the electorate of Hanover, whose sovereign, the King of England, was at war with France. The minister was there arrested, and afterwards sent over to England. As His Britannic Majesty had, in that instance, only exerted the right of war, neither the court of France, nor that of Prussia, complained of his conduct.'

"The case of Mr. Laurens is the next. He was going as minister from the United States to France, and was captured at sea. His petition to the House of Commons, complaining of the treatment he had received, and asking, 'under proper conditions and restrictions to grant him enlargement,' says simply, 'that he was captured on the American coast, first landed upon American ground, where he saw exchanges of British and American prisoners in a course of negotiation,' but puts forward no one single word to suggest that he was in a neutral vessel, or that his capture was illegal, or even irregular—'An. Reg. 1781,' p. 322. He had no reason to pretend that. All the books of the time say that he was captured in 'a Congress packet,' (a phrase no doubt used because the United States had not then been recognised,) on the banks of Newfoundland, by the *Vestal* frigate. In some of the accounts the packet is described as 'armed,' and 'armed with fourteen guns.' This was, therefore, the seizure of an enemy in an enemy's war ship.

"Lucien Bonaparte's case follows:—He wrote to Murat to send him an American vessel to convey himself and his family to Naples, where he wished to reside. A storm arose—not for preservation from shipwreck, but to obtain relief from sea-sickness—he put into Cagliari, then a hostile port, for Sardinia, allied with England, was then at war with France. He was thus in the condition of an enemy who, for any reasons of his own, presents himself to his foe. His case, as he was travelling with his family, was considered as one of hardship, but was never treated till now as a violation of the law of nations.

"Then comes the case of Bellew M'Manus, of which the utmost has been made. The statement of the facts of that case, as it is made in the columns of a violent opponent of England, may be taken from those columns themselves. The very first sentence of that statement disposes of the case. 'We have a precedent in the action of the British Government itself, in a precisely similar case, in the rebellion of 1848, when the person of Terence Bellew M'Manus was forcibly taken from an American ship, the brig *N. D. Chase*, of Boston, under protest of the officers, in the harbour of Cork, where he had taken shelter under the stars and stripes, at a moment, too, when she had cleared the port and was virtually on her voyage, having been lying off the harbour for six days, waiting for a favourable wind.' It is clear, from this statement, that this was merely an attempt to make an American vessel in an English port an asylum for a criminal against the authority of the English laws. The expression 'lying off the port' is equivocal in itself, and is to a great extent contradicted by the next phrase, 'waiting for a favourable wind,' for if outside the port, which the word off is meant to imply, there is no American captain that would have waited for a favourable wind. Inside it he might have done so, for a wind blowing directly into the port might prevent his coming out. But giving the fullest effect desired by its writer to the expression, and forgetting the previous part of the statement that the affair took place 'in the harbour of Cork,' which is at variance with it, still the case is worth nothing in law, and is condemned by Mr. Beach Lawrence himself in his letter to a supposed questioner, where he begins by admitting that a vessel 'within a marine league of the shore' is to be considered as 'within the waters' of the adjoining land. His words are these—'When I saw you yesterday, I supposed that Messrs. Slidell and Mason had been taken from a British steamer in British waters, that is to say, within a marine league of the shores of a British island. In such case their seizure would have been as objectionable as if made on the land, and a gross violation of neutral rights.' In facts,

therefore, which give the law, and in the principles of the law itself, this case fails to present any justification for the present proceeding."

**"ADJUDICATION BY A COMPETENT COURT A NECESSITY.**

"Then, as to the subject of not taking the vessel into port for adjudication. It is a settled rule of law that the searcher stops a neutral ship at his peril. As the legality of the stoppage is to determine his liability to make compensation, he must take the ship where a regular adjudication can take place, and must not adjudicate for himself. There would be no protection for property nor much, perhaps, for life, if every commander of a war vessel, public and private, (and the Americans expressly refuse to abolish privateering,) was to be the ultimate judge of the right to confiscate the one or take the other. The captured party must submit to the adjudication of the courts of the country of the captor. This is surely sufficient for the purposes of the captor. But all the world gives credit to courts of justice for proceeding upon recognised principles and precedents, and if a court makes a mistake, it becomes the duty of the country where it sits to afford a remedy. Its honour and dignity are concerned to do so. They are not so concerned in the act of any one individual officer; and for the protection of all men the decisions of competent courts are those alone to which universal deference is paid. It is not, therefore, a trifling matter to insist on, that if the rights of a neutral vessel on the high seas are encroached upon, the lawfulness of the act shall be forthwith submitted to the adjudication of a competent tribunal, that so its character, and the character of the government which has established it, shall be made answerable for justice being done. The inconvenience of the particular ship or its passengers may be greater, but so is the responsibility of the state; and the fact that it is so will operate to prevent that state from permitting its cruisers to do acts which, if only referred to individual zeal, might indeed be made the subject of a convenient reproof but a secret and more sincere approval."

Our readers will concur with many of the following excellent suggestions thrown out by Dr. Waddilove with a view to the amendment of the law of nations:—

"In this brief sketch of some of the salient uncertainties of international law, my task has been comparatively an easy one—not so, however, is the effort to find a remedy. It is a standing reproach against international law that it is but 'the law of the strongest'

**The weaker nations contend for *mare liberum*, the stronger for *mare clausum***—when it suits the purpose or the interest of a state or sovereign, there is no hesitation to set at nought its best recognised maxims. From that reproach we cannot claim immunity. What regard for international law had the British nation when its fleet bombarded Copenhagen in 1801? What regard had Bonaparte for international law when he issued his Berlin and Milan decrees? What regard for international law had the British Government when it proclaimed its orders of 1806-7, thereby endeavouring to establish a paper blockade? What regard for international law had the British Government when it insisted on forcibly taking British seamen out of American vessels? What regard for international law had Bonaparte when, after the peace of Amiens, he seized all British subjects in France and kept them as detenus in his prisons? What regard for international law had the Emperor Paul when, in 1801, he laid an embargo on all British vessels in the harbour of St. Petersburg, and seized the persons of those on board of them? What regard had the Russian officer or his sovereign for international law when, in the Crimean war, the former fired on a flag of truce? and lastly, what regard for international law had Captain Wilkes when he forcibly took the Confederate Commissioners out of the *Trent*? He tells us he consulted authorities; but he could find none to advise him whether the term ‘despatches’ could be extended to persons so as to make them contraband of war: but making the wish father to the thought, he deemed they could—and acted accordingly. Had he had some definite authority to have referred to, he could not have had an apology for his alleged error. Mr. Seward, in reply to our ambassador says, in repudiating the act of Captain Wilkes: ‘What has happened has been simply an inadvertency, consisting in a departure by a naval officer—free from any wrongful motive—from a *rule uncertainly established*, and probably, by the several parties concerned, either imperfectly understood or altogether unknown.’ I may here remark that in our late war, the Admiralty authorities supplied our naval officers with a very useful compendium of international law—‘The Principles and Practice of Prize Courts,’ edited by Dr. Pratt.

“Such being the practical disregard of the maxims of international law, and the uncertainties which surround them, it is, I deem, worthy of consideration, whether some attempt should not be made to place it on a more firm and certain foundation; whether the powers of Europe, in conjunction with America, should not jointly lay down some comprehensive, fixed principles, which they would bind themselves to respect and enforce.



"Hitherto and at the present day, the universal usage and consent of nations authorizes a belligerent state to establish within its own territory courts of prize competent to decide upon the lawfulness of captures made within its own territory, and brought into its ports for adjudication. Objections have been raised to this as an assumption of authority over the property of those who are, against their will, brought within a foreign jurisdiction. Again, on the other hand, it has been defended as a protection to the neutral, inasmuch as it prevents his property being confiscated at the will of the captor and enables him to claim its restitution and compensation, if it has been unjustly seized. This defence of the practice, together with its simplicity and apparent equity, have induced all civilized nations to acquiesce in it ; and the only real objection against it is the abuse a belligerent may make of it against a neutral as well as against his enemy, by straining the recognised maxims of international law, or enforcing those which may clash with the views of other nations or by introducing novel ones. To prevent this it were desirable that there be an established, recognised, universal international code. Bentham strongly urged this ; and whatever may be said as to the peculiar or visionary views of that philosophical law reformer, we must admit that some of the most valuable recent amendments of our law are in accordance with his suggestions. A great advance has recently been made in this direction. The declaration respecting maritime law of the Congress at Paris of April, 1856, promulgated four most important canons as a basis for the formation of a definite, and rational, and equitable international system.\*

"In these resolutions, several other powers have concurred. America has been invited to give in her adhesion, but she has hitherto refused. She objects to the abolition of privateering, urging, as her reason, her inability to cope with other nations in case of war, whose navy was larger or more powerful than her own, unless she resorted to reprisals by means of her private mercantile marine. It must, however, be said, that the President of the then United States expressed a readiness on the part of his countrymen to relinquish privateering—provided the leading powers of Europe would concur in

\* "Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, agreed in the declaration as follows :—

"1. Privateering is, and remains, abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4. Blockades, in order to be binding, must be effective ; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

proposing a rule of international law so as to protect private property on the ocean from seizure by armed cruisers as well as by privateers, the United States would meet them upon that broad ground. England, however, will not consent to this; although a desire to render neutral property at sea as free from capture as it is on land has been expressed on behalf of the mercantile community, the authorities in power and the mass of the people are unwilling that England should be shorn of a right which would affect the prestige of her naval supremacy. Here, then, these questions rest—America arms and sends forth her privateers, and England is ready to seize the merchant ships of her enemy. But to revert to a practical remedy for the evils I have described, in the event of one uniform doctrine being established, where is the authority to enforce it to be centred? Is it to be left as at present, to each state to determine whether the law has been violated, or should there not be a mixed tribunal less partial in its constitution? This is a question I throw out for the consideration of this Society. It has done much towards the amendment of our municipal law—I conceive it a subject worthy of its attention, whether it cannot aid and further the views of the Congress of Paris in endeavouring, in the language of its declaration, ‘to prevent the deplorable disputes attending the uncertainties of maritime law.’ First establish some fixed uniform rules and then constitute a tribunal to enforce them. Doubtless there are difficulties in accomplishing this, but let not these deter us from the attempt. The prospect of war is happily for the present at an end. It is during peace that we can calmly and dispassionately give our minds to the subject, and if we should happily succeed in our effort, we shall have the satisfaction, not merely that we have composed and healed national hostilities, but that we have done far more, we have endeavoured to prevent them, and Heaven grant that we may succeed in so doing.”

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#### ART. VIII.—PRACTICE OF THE DIVORCE COURT.

*The Practice and Procedure of the Court for Divorce and Matrimonial Causes.* By W. ERNEST BROWNING, Esq.  
London: Butterworths.

THE real and substantial novelty imported into the body of English law by the Divorce Acts consists in the legal

assertion which they contain, that society in its judicial capacity should have power to dissolve the marriage tie and rescind contracts made in consideration of it. The principle underlying this power may be expressed in the postulate that society has the right to relieve individuals from a burden or a pressure which its own necessities have laid upon them. Upon this view it is, therefore, neither more nor less than the same principle which supports and justifies equitable relief in other matters.

But though this principle is sufficiently simple to be intelligible, and sufficiently just to demand an acquiescence, it had never been previously legalized in our own country. It had, however, been long since admitted in parts of Europe, having been in operation for some centuries in Scotland, and for many generations in Prussia. But the wide divergence in point of national temperament between those countries and England made it doubtful at the first whether such a principle would be acceptable to the English mind, so peculiar as it is in its character and phenomena. That doubt, however, is now set at rest, for the law has been accepted by the nation as a boon of equitable relief. It is now naturalized in the mind of all classes, and the next generation will perhaps rank it with its favourite prepossessions, and will no more think of impugning the policy or justice of this institution than of that of trial by jury or legislation by the estates of the realm.

So much for the principle of this law. In its details there is much that reflects the national character; there is in the one as in the other, the same striving for liberality, tempered by a compromise of prudence and social fear; and nothing displays this more than the line of demarcation drawn by the new law between the vice of the wife and the vice of the husband. The first enures to a dissolution of the marriage tie, but the other leaves its stability unshaken, and the Mezentian union is all but unaffected.

This distinction is to be regretted, as it converts into a

statutory right the recognised impurity which society has in all ages tolerated, if it has not upheld, in man; and it is the more ungracious, inasmuch as in point of fact it affords a protection which is not needed by ordinary men. The theoretical equality of the sexes might have been conceded by the Legislature without any real infringement of the practical license which a husband may always enjoy, if he will combine with the morals of the man of the world his usual circumspection and prudence which do duty for decency. There was no occasion for a statutory recognition of the superior impunity of the husband over the wife in point of impurity. The omission of all distinction between adultery committed by the wife and adultery committed by the husband would have left ordinary husbands as they are, and would have satisfied justice by giving the wife the freedom of divorce in cases where unlimited and habitual profligacy on the part of the husband has made him intolerable and unfit for the converse of a virtuous woman. But as the law now stands, the wife has no sufficient remedy against the *husband* in such a case, for a thousand lapses of the latter are but as one in the indulgent eye of the law.

Dr. Johnson's famous *dictum* upon the irregularity of the sexes, in the matter of intrigue, embodies so one-sided a conclusion, that if it were not generally received it would neither require nor deserve refutation. But it was such a favourite axiom with both Houses of Parliament when the first Divorce Bill was debated, that it has now acquired an importance which the Doctor himself would never have arrogated for it. There is required, however, but little philosophy to demonstrate its unsoundness.

In the first place, adultery, so soon as it is disclosed, is as distasteful and repugnant to the feelings of the one sex as of the other. In the second place, while the spuriousness of a wife's issue may impose no additional burthen upon her husband, the support of his spurious brood must operate adversely to the just interests of the virtuous wife, and even

legitimate offspring, by diverting from their subsistence and advancement funds of the husband which should and would otherwise have been applied to those purposes. And lastly, it by no means follows that the wife's adultery imparts a spurious issue into a family, for there may be no issue at all, or the issue, notwithstanding the adultery, may be that of the husband, who, having better opportunities than the stealthy Lothario, must generally be the father of the children which are attributed to him. Practically speaking, therefore, the adultery of the husband, unless it be the fortuitous attachment only to the Cynthia of the moment, must act, in most cases, more injuriously to the interests of society than that of the wife; and the ground for attributing greater social iniquity and greater social mischief to her acts falls entirely to the ground.

The abolition of the action for crim. con., and the necessity imposed upon the husband to make the adulterer a co-defendant with the wife, is perhaps the happiest piece of legislation which modern days have seen; for, as the adulterer, by this form of proceeding, can neither escape punishment, nor evade a disgraceful or ridiculous publicity, the interests of society are advanced, and a dreary discouragement has been substituted for the false glory of systematic and unblushing intrigue.

The foregoing remarks have been called forth by the defect in the Act of 1857, which makes adultery a ground of dissolution in the case of the one sex and no ground at all in the case of the other. But as great a contradiction in law is to be found in the Act of 1860, which constitutes the Queen's proctor a *censor morum*—for a pecuniary consideration—giving him power to show cause against the verdict of a jury given, and the decree of the Court made, after hearing all persons who have any interest in the matter at issue. The Legislature, in this enactment, would appear to be afraid of its own works and to have resolved to put its child, now four years old, back into swaddling clothes, in order to cramp the energy and action of its future life.

The nature of the relief afforded by the Divorce Acts, as it is natural to suppose, has made the Divorce Court a popular tribunal. The number of suits prosecuted in that Court has been unprecedented, and equally unprecedented has been the burthen cast upon the Judge Ordinary. But that eminent judge has borne the burthen stoutly and unshrinkingly. His decisions have realized those successful results which apprehension of the clearest order, judgment equally exact, and sense of justice uniformly true, when united in the same individual, must necessarily effect.

Mr. Browning has done wisely and well to wait until the principles of law which govern the cases ventilated in the Divorce Court have been fully evolved and settled. This delay has enabled him to give the public a work of very considerable merit and great practical utility; and we have in this work what the lawyer and the practitioner require. We have principles of law clearly and perspicuously enunciated and most copiously verified. The various subjects are methodically distributed, and the style is polished and agreeable. All the forms now in use and taxed bills of costs are also appended to the work. After a careful study of this book, we unhesitatingly recommend it as well to the student as to the legal practitioner.

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#### ART. IX.—DIS-UNION OF UNITED STATES: RIGHT OF SECESSION.

*Outlines of the Constitutional Jurisprudence of the United States, &c., &c.* By W. A. DUER, LL.D. New York. 1833. Duod., pp. 249.

*What is our Constitution—League, Pact, or Government? Two Lectures on the Constitution of the United States, &c., &c.* By FRANCIS LIEBER, LL.D. New York. 1861. 8vo., pp. 48.

*The Rebellion Record: a Diary of American Events, with*

*Documents, &c., &c.* Edited by FRANK MOORE; with an *Introductory Address on the Causes of the Struggle, and the Great Issues before the Country.* By EDWARD EVERETT. New York. 1861. 8vo., pp. 425.

*Union and Peace: how they shall be restored.* Speech of the Hon. CHARLES SUMNER, before the Republican State Convention, at Worcester, 8th October, 1861.

*Causes of the Civil War in America.* By JOHN LOTHROP MOTLEY, LL.D. London. 1861. 8vo., pp. 30.

*Remarks on Mr. Motley's Letter in the London Times—on the War in America.* Charleston, U.S. 1861. 8vo., pp. 23.

*Speeches of CHARLES FRANCIS ADAMS, of Massachusetts, delivered in the House of Representatives, 31st January, 1861.* Washington. 8vo., pp. 8.

*The Union and Southern Rebellion: Farewell Address of MR. ADAMS to his Constituents upon his acceptance of the Mission to England; and Speech of MR. EVERETT at Roxburgh, in behalf of the Families of the Volunteers.* London.

*The American Union, &c.; with an Inquiry into Secession as a Constitutional Right, and the Causes of the Disruption.* By JAMES SPENCE. London. 1861. 8vo., pp. 366.

*The Effect of Secession upon the Commercial Relations between the North and South, and upon each Section.* London: Stevens. 1861. 8vo., pp. 78.

*A Popular View of the American Civil War.* By A. J. B. BERESFORD HOPE. Ridgway, London. 8vo., pp. 42.

*Five Years' Progress of the Slave Power.* By the Hon. J. G. PALFREY. Boston, U.S. 1852. 8vo., pp. 84.

THE Civil War unhappily raging for a year past in the lately United States of America, still extending like wildfire, is the most appalling and terrible conflict of civilized human beings in the history of nations. Its sudden coming resembled the unexpected eruption of a volcano, and the horrors of an earthquake, momentarily destroying a great city.

The Federal system of republican government is rent in twain. The Union when the war commenced comprised thirty-three states and seven extensive territories. The last census, in the very year of this disruption, enumerated a gross population of 31,676,217 souls—the *free* population numbering 27,673,221, the aggregate *Slave* portion being 4,002,996. Of this heretofore peaceful, industrious, wealth-producing, and socially progressing people, twelve hundred thousand men are now embodied in military array—wholly withdrawn from their recent industrial avocations, and five-sixths of this vast army being exclusively paid and maintained by the two contending Governments of the disunited States. In the meanwhile the cost of this frightful political struggle exceeds that of any war, foreign or “civil,” in the annals of ancient or modern nations.\* The “Confederate,” or Southern States, seceding, are nearly financially ruined; and even their great staple production of cotton may be irretrievably destroyed. If the war continues, and the Slaves revolt—the North playing its last card in manumission—the white population of some of the Slave States may be exterminated, masters and slaves perishing in scenes of bloodshed more horrible than any recorded in the history of St. Domingo. The North, it is true, cannot be subjected to the same desolating social evils; but already the Border States are divided one against another; the North has to maintain 700,000 soldiers, besides a costly navy; it provides its expenditure almost exclusively by loans—*i. e.*, by burthening posterity. Last month suspended specie payments throughout the Federal States, with all the certain future consequences of two prices and the irresponsible and lavish use of paper-money by the Executive. But it is not our object to examine the causes and consequences of this unhappy and desolating civil war; we restrict

\* On the 9th of January last, Mr. Hale, a senator, in a speech in Congress on the cost of iron-clad gunboats, addressing the Senate, said, “Do you know what we are now spending daily? More than a million and a half of dollars.” Mr. Grimes, interrupting the honourable member, exclaimed, “Nearly two millions and a half.” Mr. Hale rejoined, “Well, Sir, I have put it small; I always go under the mark.”—*Washington Daily Globe*, 10th of January.



our commentaries to the merits of the publications, chiefly Transatlantic, at the head of our present article.

This melancholy and devastating civil war involves an important question of Constitutional Law—the right or *non-justification* of Secession—and which we take for our text.

It is marvellous to see the honest and mental labour wasted by the orators and literary champions of both sides. They would have Europeans believe that the principles and experiences involved in the question are of to-day, and not of yesterday. Nothing new is really evolved on the Theory of Government; but in practice every new example and illustration of political revolution is of interest and practical worth. New England and the other Northern States had vainly believed that they had a nonpareil *form* of Government. Some of the Southern States were not so confident; they lagged behind in giving their original adhesion to the Union, long doubting their *interest* to join in a common government; their doubts being founded on their dissonant interests as slave-owners and free-traders. Ultimately, however, after the breakdown of the first form of common association, after the accomplishment of their independence of the mother country, a Convention of Deputies from the States of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, at a Session begun May 25, and ending 17th September, 1787, agreed on *the* “Constitution of the United States.”

Now, our present purpose is to examine the Right of Secession and the soundness and durability of the political union thus erected. The test is the solidity and permanency of the *form* of government and its democratic institutions, from 1787 to the present new year.

The best text book of the outlines of the Constitutional Jurisprudence of the United States is that of Dr. Duer, designed and accepted as such, and a class book in the academies and schools of the Northern Union States, “A Manual for

Popular Use." Mr. Duer was one of the codifiers of the New York Statutes; he was a judge, and once President of Columbia College in the city of New York. He was some years ago personally well known in Europe and much esteemed for his legal learning and judicial experience. In his excellent treatise he states the origin of political Constitutions or Governments to be in *form* twofold, either *simple* or *mixed*. The simple forms he enumerates as—

1. *Monarchy*, where all power is vested in a *single* individual.
2. An *Aristocracy*, where the powers of government are exercised by a *select number*, or a single class of men. And
3. A *Democracy*, in which all power is retained in the hands of *the people*, or of the society at large.

The author then defines a "mixed government" to be all the above three, or any two of the simple forms, united. Singularly, in his eighth proposition he admits "that the formation of a constitution, on a single principle, whether of monarchy, aristocracy, or democracy, is the most practicable and easy mode; but the union of the three simple forms in due proportion, so that each shall be sufficient to support itself in the exercise of its appropriate functions, and all be made to harmonize and co-operate, is the most perfect system and the only true basis of a *democratical republic*." We would not desire a higher eulogium on the composition of the British Constitution. We accept it as the solid basis of our old and proved system of government. But the fallacy of Mr. Duer as regards the now disunited States of America is in his proposition, that the perfection of the Transatlantic *Utopia* was "effected by the proper relative distribution of the *powers of government* amongst the several *branches*, according to the principle of REPRESENTATION, whereby each is constituted, in its respective department, the immediate and co-equal representation of the people, as the direct source of its authority, and the sole ultimate depository of the sovereign power." Mr. Duer buries the first defunct United States Constitution with funeral honours, announcing the advent of the existing

shattered Federal Constitution of 1787 in propositions numbered 41 and 42. They are as follows :—

“By the terms of the *Compact* the States, as members of the Union, are no longer regarded in their sovereign and corporate capacities, as they surrendered such portions of their sovereignties as were requisite for the purposes of national government ; retaining, however, their previous organization and the exclusive control of their local concerns.

“The former compact between the *States* was annulled ; and the *people of the several States*, by their ratification and adoption, in their respective conventions, of the new constitution proposed to them by the General Convention who framed that instrument,—united with each other in establishing a permanent (?) system of national government, operating directly upon individuals, for the attainment of specific objects, for which neither the States separately, nor the former confederation between them, had proved competent.”

Doubtless the noble English patriots, who effected our Revolution of 1688, did not dream of our own new “Compact” of 1832. A vast increase of population, trade, and commerce, immense colonial acquisitions, the printing press, and steam by water and land, had created a new and larger people, and a greater distribution of wealth than our ancestors of 1688 ever imagined. What generation of men ever dived into futurity, or placed Posterity in fetters ? So the United States outgrew the Declaration of Independence and the Convention of 1787. The Farmer’s Letters, the Federalist’s admirable volume, the affecting leave-taking and solemn injunction of Washington to deify the Union, and all the many eloquent and logical orations in Congress since President Jackson’s occupation of Charleston in 1833-4 to the present moment, failed to demonstrate that the celebrated Transatlantic *form* of Republic was perfect or unalterable. How could it be unchangeable, or continue for ever unrevolutionized ? The territorial possessions of the States have vastly increased since 1787 : the population has quintupled, and is advancing at a geometrical progressive ratio : the *Slaves* have multiplied upwards of tenfold ; manufactures have been established, and the Northern States had created a

vast carrying trade to all parts of the world. In the mean time, has the Constitution remained unchanged? It has been throughout the present century silently revolutionized,—not imperceptibly, for many of its leading statesmen measured and foresaw impending changes with fear and alarm. Slavery was the basis of the last “compact,” and the apple of discord. That unfortunate element of national weakness was the mortal disease of the Union. The constant “acquisition” of new territories—the absorption of the Floridas, Louisiana, the Texas, Oregon, and California—even the inventions of the cotton gin, and the mechanic appliances of steam in the British manufactures, all contributed to shake the foundations of the United States’ Constitution to its centre. The boundaries between Free and Slave labour were the battle-fields of contention which placed the Northern and Southern States in constant periodical contention and rivalry. The unfortunately short term of the Presidency was also a fatal error in the Constitution. It periodically revived and embittered party divisions, and created fresh causes of disunion. But, notwithstanding its numerical inferiority the South had usually contrived, with its powerful allies in the commercial Northern States, to nominate the Presidents and to monopolise the most valuable patronage of the Federation. In 1860, the election of Mr. Lincoln put a final end to the political supremacy of the South. In truth, the new and rapidly increasing population of the Western States and the vast European emigration into the free soil States “swamped” the old Union, and upset the equilibrium of the original States. The old electoral qualifications, originally high property franchises, were merged in Universal Suffrage. Population, by the U. S. Constitution, regulates the distribution of the governing powers. The ratio of representation is now 127,381, by the recent census. The increase of the slaves was no compensation for the mushroom creation of free labour votes. Hence, the statesmen of the South knew that their ruling days were numbered. Nor was this discovery of the wiser Southerners of recent date. For

thirty years and more the disruption had been imminent. In 1833, the question of Protection and Free Trade nearly severed the two classes of States. The Northern States unwisely and unjustly imposed heavy duties in protection of their own rising home manufactures, to the serious loss of the South. John Quincy Adams, in his inaugural address, 1825, spoke of "dissensions perhaps inseparable from the enjoyment of human freedom, and which had more than once threatened the dissolution of the Union;" but he wisely added that "collisions of party spirit are transitory—those founded on geographical divisions, adverse interests of soil, climate, and modes of domestic life, are more permanent, and therefore, perhaps, more dangerous."

In 1828 these smouldering embers of political differences and disunion burst into a flame. The Southern States gave notice that they should secede, the banner of secession being the protective Tariff imposed upon them. Dr. Thomas Cooper, an Englishman and member of our Bar, who emigrated from Manchester in 1798, (one of the most remarkable men of his age,) established in that year the *Southern Review*, published at Charleston. It was designed and conducted for four years to undermine and destroy the Union. Southern-trained bands were embodied and drilled. Congress was the scene of constant and bitter party strifes. The press and pulpits of the South constantly and with impunity advocated Secession. Calhoun was the great leader and idol of the Southerners, one of the most able, eloquent, and dauntless of statesmen. But the movement was premature, and the pear was not ripe. General Jackson, foreseeing the crisis, occupied Charleston with troops of the line and crushed the incipient revolution. His memorable proclamation of the 10th December, 1833, against the ordinances of South Carolina of the 24th of the preceding November on the subject of the Tariff, and that President's prompt and energetic military force, terminated the danger. The President's document urged every real and specious argument against the right of secession. It is understood to have been penned by Edward Livinstone. It, in

fact, exhausted the question, so far as the Northern construction of the letter and spirit of the last Federal Constitution. All the recent logic of the Northern controversialists are little more than distillations or dilutions of that great State paper. But the snake was only scotched, not killed. The battle still continued under the guise of the doctrine of *Nullification*, or the reading of the Constitution that every separate State had the right to *veto* obnoxious acts of the Congress and President; that is, such acts as each separate State might consider unconstitutional or an invasion of *State* independent powers. In fact, the victory of General Jackson effected not a peace, but simply a truce. A *Tariff Compromise* was the real result of this serious collision between the separate States and the Federal power. Nullification therefore, though it did not become an acknowledged rightful remedy, was yet respected as an efficient one. Calhoun's Works in six volumes are now received as the decalogue of republics. He is even now worshipped as the patron saint of the South. In old age, in a letter written so late as the year 1847, to a member of the Alabama Legislature, published since his death, he avowed that he was from the beginning of the contest in favour of "forcing" the slavery issue on the North, believing that delay was dangerous, and that the South was relatively stronger, both morally and politically, than she would ever be again. His famous "South Carolina Exposition" was a manifesto substantially adopted by the Legislature of that State, and was founded on the Virginia and Kentucky resolutions of 1798-9. Calhoun's doctrine of Nullification was—that it was the right of each State to prevent the execution within her limits of such acts of Congress as such State might judge unconstitutional. In reply to a lady, who asked what inscription on his tomb he would desire, his answer was, "If you ask me the word that I would wish engraven on my tombstone, it is NULLIFICATION."

Henry Clay, one of the most eminent, and perhaps the last, of the old school of Union statesmen, always privately avowed his conviction of the rottenness of the Federal fabric. Advo-

cating the vital measure of Nullification compromise in Congress, his telling and startling words were, "Save the Country, save the Union, save the American system!" Gallatin, when last in England, openly expressed similar apprehensions; as also did Mr. Webster. Even Mr. Buchanan, while President, notwithstanding his utter incapacity to pilot the vessel of the State in the present political hurricane, in 1859 avowed to private friends *his* anticipation of an early secession, and which, unfortunately for his national reputation, burst out before his exit from office. Indeed, in conversation with most of the eminent U. S. public men of North and South who have visited England within the last thirty years, we ourselves have heard the same common opinion. In fact, one of the authors of a Northern pamphlet (among the dozen articles of our text) not two years ago, in London society, emphatically stated that "the die was cast," and the year of separation not far distant. Those we allude to were not "stump orators," nor opulent tourists, but men of superior intellect, reflection, and political experience. Few European merchants resident in the States failed to observe the rickettiness of the Federation. Almost all the older Americans and foreign observers of the action of the Federal U. S. Constitution, and of the working of its institutions, discerned the depreciated composition of the House of Representatives, and even the lowered character and influence of the Senate. How could it be otherwise, when the Presidency and Vice-Presidency were become subjects of "compromise," bestowed on vulgar and inexperienced public men; when Universal Suffrage was based on ignorance and poverty; and when, in fact, the intelligent and wealthier classes of U. S. society have been long practically excluded from all political authority and station? The volumes of Thomas Cooper,\*

\* Thomas Cooper was a man of powerful, honest, though dogmatic mind. He was born in London in 1759, and died in South Carolina in 1840. He was a graduate of Oxford, and called to our Bar, and for some time travelled Circuit. But the natural sciences being his bent, and the dreariness of the road to legal business, induced him to pursue trade. During the French

De Tocqueville, Chevalier, Tremenheere, Miss Martineau, Ormsted, and Stirling, and other European writers, had long since prepared the minds of men for coming "rebellion" and a collision of classes. For years past there has been much corruption of the innumerable electoral bodies of the single and Federal States. The latter dry rot had of late penetrated even the halls of Congress. All the administrative departments had become tainted by corruption. These are no foreign accusations against the "American System." A reference to the weekly letters in the London *Morning Post* for the past twelvemonth, from Boston, out-Herod Herod. They are the known production of Mr. George Sumner, the brother of the manly and eloquent advocate in Congress of the anti-slavery

Revolution he was deputed with his friend the late James Watt, Jun., by the English democratic societies, to fraternize with the affiliated societies of Paris. Taking part with the Girondists and foreseeing their downfall, he had to fly home for his life. In Paris Cooper learnt the secret of making chlorine from common salt, and he was one of the first bleachers and calico printers in Manchester. The plant not turning out profitable, he afterwards emigrated to the United States, establishing himself in Philadelphia as a lawyer. He afterwards became a judge and an eminent law reformer. Retiring from the Bench, he held professorships of chemistry and geology in Dickinson's College, Pennsylvania, and in Columbia College, South Carolina; and of the latter University he became President, in 1820. He was the author of voluminous works on Law and Science. His best volumes are a translation of Justinian, with notes in illustration of Roman and modern law, and his lectures on Political Economy. The two latter contain many striking illustrations of the "American System" and on the "road to ruin" pursued by the then existing Federal Union. In 1834, at an advanced age, the revision of the Statute Law of South Carolina was confided to his care, and admirably executed in two volumes. In the States he was known by the *sobriquet* of the "American Brougham." In our next number we will give a memoir of Cooper, and an account of his many and valuable writings. He was the author, when young, of the two remarkable articles on Government and Materialism in the old Manchester "Philosophical Transactions."

We have mentioned also the name of Chevalier as a valuable commentator on American U. S. institutions. The value of De Tocqueville's volumes ought not to be praised as the only French work on the subject referred to. We have mentioned one of Chevalier. Few persons in this country even know Chevalier's volume, or that it is the early and very able production of *Michael Chevalier*, the living eminent leader of the French free trade party. M. Chevalier visited the States, employed by M. Thiers, in 1834. The popularity of De Tocqueville's volumes and their translation in England may have eclipsed those of M. Chevalier, and the latter are untranslated; but in *practical* observations on the American institutions and the future of the States, his work is really equal, if not superior, to that of the late admirable philosophical writer. M. Chevalier foresaw and foretold the Transatlantic revolution now raging.



party. No language can exaggerate Mr. George Sumner's reflections on the rottenness of the entire administration of his country. The *Manhattan Letters* of the *Standard*, if possible, are more abusive and unpatriotic than the G. Sumner Epistles. *Manhattan* is a New Yorker. We are, however, bound to state, that no such diatribes or bitter personalities emanate from the South. Perhaps the only power really improved is that of the public press, and which seems now to be almost *pro tem.* the sole instrument of government in the Northern States, the Lincoln Ministry having taken it under the protection of its own censorship. Thus only can we account for the marvellous changes within forty-eight hours of the public mind on the placid surrender of Messrs. Slidell and Mason.

But we proceed to the real subject of our article—the nature of a Federal system, and of a Republican Federation; and of the rights or wrongs of Secession.

Federation, or confederation, a league of union of several sovereign states, generally under the direction of a supreme government, was no discovery or new invention of the architects of the American Constitutions. They only modified, altered, and extended old forms and precedents of the ancients. Our historical readers well know that Federal unions were formed very early, and were common in antiquity, particularly among the Greeks. Mr. Grote's invaluable volumes give many instances and learned remarks on the Greek democracies. The most famous of them was the Amphictyonic, embracing twelve states or tribes. Similar leagues existed among the Greek colonies in Asia Minor. The *Æolian Federation* possessed Lesbos, Tenedos, and other islands, and on the main land twelve confederated cities, of which the chief were Cyme and Smyrna. The *Ionian Federation* also comprised twelve cities, the principal of which were Ephesus, Colophon, Priene, Phocæa, Samos, Teos, and Chios, the last three being the capitals of islands of the same names. We need not enumerate the Dorian and Achæan leagues, or detail the various towns and countries forming the Phœnician States, of which Tyre

was the principal city. In Italy the principal and most enduring Federation was that of Etruria, comprising twelve cities. Rome overpowered and absorbed it. The next great European Federation began in the ninth century—that of the German empire: this so-called Federal system was for centuries a singular compound and skeleton of a league, comprehending a multitude of old, smaller, so-called states and many hundred of German sovereignties. During the present century this old guild of limited ruling powers and titular princes was completely unfederalized by the first Napoleon. It was, in fact, broken up by that great macadamizer of old states and overthrower of thrones. In 1806, Francis, the last Emperor of Germany, abdicated the headship of that ruined union. The German States were politically divided in the great Continental wars of Bonaparte, and several of them “seceded” from the old Federation, forming the “Confederation of the Rhine,” under the protectorate of Napoleon I. This league perished with the French “empire,” in 1815, and thence originated the re-formation of the existing partial and, probably, expiring Confederation, comprising thirty-four monarchical states and the four free cities of Lubeck, Frankfort, Bremen, and Hamburgh. Perhaps the most memorable and powerful Federation in Europe was that of the Hanse Towns, or the Hanseatic League, formed in the thirteenth century by the maritime cities of Germany, for the object of protecting their commerce against pirates, kings, princes, and nobles. It once comprised eighty-five cities, and exercised great political power. But as piracy ceased, and as order and better government progressed in Europe, this great and originally useful “co-operative society” fell to pieces—the Federation being dissolved in Lubeck, A.D. 1630. The Swiss Republic is really the sole remaining Federal power on this side the Atlantic: it has lasted, with short intervals of foreign conquest or occupation, and occasional changes of territory, now more than five centuries. The Federal Government of twenty-two sovereign cantons now consists of a diet of deputies,

chosen by the cantons or states. Party and religious disputes, however, have often rent and perilled the Helvetic Federation; but its vitality, hitherto, has resulted from its mountainous territories difficult of access and conquest, and from the courage and patriotism of the Swiss, whose love of "native land" has become a proverb—the Alps are its conservation; it suits the great Powers of Europe to maintain and guarantee the integrity of Switzerland, its mountains being barriers and boundaries between contending and jealous neighbouring states.

A recent American writer thus glorifies the disunited Federal system of the States :—"The United States of America afford the most striking example to be found in history of the successful working of a Federation on a grand scale. The attempts to imitate them made by the Spanish American republics have proved failures, and have resulted for the most part in the abandonment of the Federative system and the establishment of consolidated governments."\* Such is the Transatlantic opinion of the United States' Federal Constitution. We do not, however, now profess to analyze the merits or defects of that Constitution; and indeed they have been the subject of innumerable Transatlantic and European commentaries. The present questions are rather, how far the form of Federation adopted by the earlier States nearly a century ago was originally the wisest and most practicable selection; and secondly, whether the States have not subsequently outgrown their early political Federal union. What may have been from circumstances an unavoidable and proper Constitution for the States in the eighteenth century may nevertheless now have become wholly unsuited to the increased number of States, to their vastly extended area, to the marvellous changes in the relative State portions of Federal power, and to the growing conflicting interests newly created in the nineteenth century. It has been affirmed that the Union never would have lasted thus long but for the advantages of steam power by land and water—never anticipated

\* The New American Cyclopædia. New York. 1861. Vol. 7, p. 439.

by the first founders of the Federation. Science annihilated space and time. It never could have been essayed, except as a grand experiment or as a form of republicanism best suited to meet the emergency of sparsely populated Colonies just emancipated from the irresponsible rule of a "mother country." Indeed, the early contest between Jefferson and the Whig party is evidence that one class thought the system not democratic enough, the other deeming it anti-conservative. On its first formation Slave labour was more the misfortune than the crime of the "Slave States." Mother country and the Transatlantic forefathers of the Colonists themselves were equally responsible for the introduction of Slavery. The importation of the African negroes had been long a legal and gainful import trade to both Great Britain and her colonies. Moreover, the recognition of slavery was the mainspring of the first and last Confederations. The North equally with the South divided the gains of slave labour and the wealth it indirectly created. New York and all the seaports of the Northern States virtually participated in the products and carriage of tobacco, sugar, and cotton raised from the sweat of the Negro's brow. Southern plantations were owned by Northerners in fee and as mortgagees, and capital was freely lent by them to the Southern planters. Northern insurance offices participated in the insurances of all Southern properties; every negro's life was insured, from infancy till loss of working power; therefore, in fact, the Northern and Southern States were, and are, nearly equally *morally* to blame in the perpetuation of the infernal traffic in human flesh. Even in the present sore tribulation of civil war, the North, by its President, his Ministers, and the Federal Legislatures, actually maintain the contract formed between the States in the sanction and maintenance of Slave labour. We can, however, scarcely condemn the North, when it has to recover the Border States (who would be unanimous against a return to the Union if the slaves were manumitted) and when we well know the insuperable difficulties of "an imme-

diate and total abolition." Remedies may be worse than diseases. Unhappily the remedy, as regards the curse of Slavery, has, we fear, been too long delayed. The slaves now number four millions. We never yet met with a practical or practicable plan of United States Negro Emancipation. The social scourge appears almost incurable, except by some shock of Transatlantic society, such as may follow from the present crash of the now broken Federal system of government. The Gordian knot may be cut, but not untied. If the North, with its superior numbers, wealth, resources, and naval power, conquers the South, what will the revived Federal power do with the original league, pact, or government, forming the shattered constitution? Will it return to the South its former relative powers in the Confederation? Will the North give by such *re-union* consent to other compromises with slavery—other Fugitive laws? and what will it do with the Tariffs, both classes of States plunged in debt which can only be liquidated by mutual direct taxation? Will Mr. Seward and his brother Ministers hereafter sit in a common Senate and House of Representatives with Mr. Jeff. Davis and his Southern colleagues? Will both parties, steeped in blood, pass a law denouncing future secessions as treason? These are the coming questions casting shadows before them. Will Virginia continue, by the leave of the North, a "*breeding state*" for the increase of slaves?

Do not all these political difficulties and insoluble problems point to conciliation and early peace—to an agreed secession? Re-union, like any article, may be purchased at too dear a price. Is it possible for such an obesity of Federation long to continue undissolved?

The conflict of interests is irreconcilable. We believe it is the policy and necessity of both classes of States to sever; of the Northern States especially. And we further believe, that Slavery will be sooner ameliorated if not earlier extinguished by the Southern States being permitted, on terms, their exit from the Federal Union. The real questions, indeed, in issue are—

the just division of the Border States, and the equal, free, undisturbed navigation of the great rivers by both parties. But on these difficult points of federation we will only refer our readers to Lord Brougham's valuable and recently published volume on the British Constitution; especially recommending the perusal of the first, second, and third appendices—his Lordship's papers on "Federal Union," and on the "Government of the United States." They are really original and valuable strictures on this great and new problem of our age.

We have already indicated our own opinion that the abstract question on the right of secession is scarcely worth discussion. In a Federal point of view it is, of course, all-important, and for public excitement a vital question. The right of revolution is the *thesis*, usually settled, not by learned writers, but by physical force—by the success or failure of revolts. It is only just, however, to state that far the best and most able arguments against the right of secession are contained in the two lectures of Dr. Francis Lieber, the well-known author of the "Political Ethics," and of other valuable and learned works. They were republished in March last, and, in the Federal sense, nothing can be added to his exhaustive retrospective review of the foundations of the Federal Constitution. Mr. Motley's pamphlet on the same side, originally published in a letter to the *Times*, is also a valuable constitutional dissertation. The speeches of Mr. Charles Sumner, Mr. Adams, (the present able and *hereditary* Minister of the United States to England,) of Mr. Everett, and the lectures and pamphlets of Mr. Tuckeman, Mr. Joel Parker, and other writers well known in England, command not only British but European attention. Nor can we close without expressing our praise of the ability and eloquence displayed on American disunion, in England and Scotland, in the newspaper press and in the addresses of our own countrymen, chiefly to constituencies. Speeches of the Duke of Argyll, of Mr. Gladstone, Mr. Beresford Hope, and of Mr. Bright and Mr. Horsman, do credit to our own country. But if any of our readers

desire to learn the history and mystery of the U. S. Slavery question we advise him to read Mr. Palfrey's "Chapter of American History," or the "Five Years' Progress of the Slave Power." It is a brief and admirable summary of the whole dispute and causes of the civil war between the States. Five years have elapsed since its first publication. It prophesied the coming tempest. We have found it difficult to procure Southern newspapers or Southern publications vindicatory of the Secession. One we possess, entitled "Remarks on Mr. Motley's Letter, in the London *Times*, on the War in America," published in Charleston,—much the most able statement of the case of the South which we have seen. The constitutional right to sever is temperately as well as logically maintained. All we can say is, that there is "much to be said on both sides," in the legal and constitutional sense. It is now irrelevant to notice the controversy as to which class of the States put itself first in the wrong. We cannot, however, but admit, that the Northerners could not refuse to take up the challenge. The South first spilt blood. The capital was menaced, and a conflict of arms could only settle boundaries even if secession be ultimately agreed.

We will now only conclude with a few observations on the pending and serious political relations of England and the Federal States. The *Trent* affair is settled, and we expect no ill consequences from the untoward act and unquestionable violation of international laws. The vexed question of the expediency of our recognition of Southern independence and of repudiation of the Northern blockade of the Southern ports will soon be forced on the British public, in both Houses of Parliament. It is well known that France desires, not unnaturally, to recognise the South and to end the blockade. There can be no doubt that the European Powers have the *right* to take both steps. Two-fifths of the States have for eighteen months successfully seceded; and the blockade is not a blockade within the rules of international law. But we trust that we shall, at least for a while, "keep our hands off,"

and patiently await events. We confess we have no stomach for any aid of the slaveholders of the South against the North; our natural sympathies are strongly with the latter. Doubtless, France and England, or France alone, could terminate the civil war within a month, as all Americans admit. But the "consequential damages" of intervention would be a great evil to Great Britain, and possibly to her loyal North American colonies especially. It is therefore, on the whole, better we should allow a further interval to the States to settle their own differences. But if the sufferings of the cotton manufacturing populations of England, Scotland, France, Germany, and Switzerland, should soon increase, and the supply of cotton staple be exhausted, we may have no alternative but interference. If, therefore, the Dis-United States cannot shortly make a peace for themselves, one may have to be made for them. Liberty and Slavery can never co-exist in modern political society; either in a Monarchy, an Aristocracy, or a Republic.

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## Notices of New Books.

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[\* It should be understood that the notices of new works forwarded to us for review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in a more elaborate form, in a subsequent Number, when their character and importance require it.]

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**The Law of Bankruptcy ; being an Adaptation of the Chapter on Bankruptcy in the Twelfth Edition of Selwyn's Nisi Prius to the Present Law, with considerable Additions and Alterations. By David Power, Esq., Q.C., Recorder of Ipswich ; and F. S. P. Wolferstan, Esq., Barrister-at-Law. London : W. R. Stevens & Sons. 1861.**

THE changes in the Law of Debtor and Creditor introduced by the amending Act of last Session rendered a considerable portion of the Chapter on Bankruptcy in Selwyn's "Abridgment of the Law of Nisi Prius" totally useless. Instead of resorting to the common expedient of issuing a new edition of the entire work, merely for the embodiment of some subsequent alteration in the law, the Editors have adopted a method which has the merit of being simple, efficient, and economical. Their object seems to have been twofold,—first, to present in the character of a separate independent treatise a full summary of the present law of bankruptcy ; and secondly, to furnish those who may have Selwyn's Nisi Prius with a supplemental chapter uniform with the original work. The Index, Table of Cases, and Table of Statutes, have been altered to correspond with the new matter introduced, so that the present volume may be substituted for the Chapter on Bankruptcy, and constitute a part of one harmonious whole. By this arrangement we have the anomalous result, that more than half the volume consists of tables of contents and of decided cases. This may operate against it as an independent treatise, though without some such contrivance its value as a supplement would be very much diminished. The introduction contains a short historical account of the Court of Bankruptcy from its earliest origin (34 & 35 Hen. VIII. c. 4) to the present time, together with a clear statement of the important alterations recently effected in its constitution and jurisdiction. The principles by which the Commissioners have been guided in their judgments, and the construction given to the terms and clauses of the Act, are stated in

the body of the work under the form of deductions from the leading cases therein compiled and analyzed. It is now too late to discuss generally the merits of Selwyn's "Abridgment of the Law of Nisi Prius." This work has been before the public since 1808, Mr. Selwyn being one of the first text book writers of any authority on Nisi Prius law. The first treatise actually published on the subject appeared without the name of the author in 1767, nor did it subsequently transpire who the anonymous writer was. The present is the last of a series of changes which the work has undergone from time to time. The chapters on "Consequential Damages," "Tithes," and "Wagers," were struck out years ago, while the issue of the present treatise on bankruptcy, under the careful editorship of Mr. Power and Mr. Wolferstan, brings the work up to the present time.

The Consolidated Statutes of England and Ireland passed in the last Session of Parliament; with Notes, Forms of Indictments, and Evidence. By J. F. Archbold, Esq., Barrister-at-Law. London: Walker & Co., 196, Strand. Dublin: Hodges & Smith. Edinburgh: Bell & Bradfute. 1861.

THE reputation which Mr. Archbold has fairly won as a writer on pleading and evidence in criminal cases will probably be esteemed a higher guarantee for the meritorious character of this volume, and secure for it a wider circulation than the favourable comments of an unknown critic. Perhaps there is no publicist whose name is more familiar to practitioners; very few whose text books have proved more practically useful. So far back as fifty years ago the author had adopted the Pleas of the Crown as a special study. From a collection of the authorities on Criminal Law then framed into a digest of three volumes, Mr. Archbold selected the materials for the well-known work on pleading and evidence, which has now passed the fourteenth edition. With these qualifications it was natural that the author should devote early attention to the salutary changes in the criminal law, effected by the legislation of last Session. Within a few months after the seven Consolidating Bills had received the sanction of Parliament, four text books, embodying a reprint of those Acts, with notes, references, &c., were almost simultaneously issued from the press. Each has its characteristic merits. Mr. Archbold's book enjoys the distinction of containing precedents of indictments, and concise statements of the amount and kind of evidence necessary to establish each offence. To the magistrate in quarter and petty sessions, to the attorney in the preparation of cases for trial, and to junior members of the Bar, these will be found invaluable advantages. Add to this that explanatory notes are appended to the most important sections, many of them containing citations of decided cases, all of them perspicuous and pertinent. Each leading topic, such as homicide, manslaughter, larceny, false pretences, forgery, robbery, &c., is introduced by a clear and almost exhaustive analysis of the consti-

tuent ingredients of the offence. Notwithstanding the amplitude of these notes, which are printed in small type, the volume consists only of 581 pages, and is by no means inconveniently bulky. There is another characteristic feature in the framework of the book. In addition to a minute alphabetical index, there is at the head of each Act a programme of its contents, "which will at once enable the reader to place his hand upon any part of the statute he may wish to consult. A work of mine," continues the author, "was recently published with programmes of contents prefixed to each part; and this seemingly pleased the fancy of the profession so much that the edition sold in a few weeks." By this happy combination the difficulty of immediately getting at any, the minutest subject treated of in the body of the work, is reduced to an almost inappreciable minimum. The author has not placed the several Consolidated Acts in the order in which they appear in the Statute-book, but according to what he conceives to be their relative importance. The first in order is that which relates to offences against the person (24 & 25 Vict. c. 100;) the second, (c. 96,) relates to larceny and other similar offences; the third, (c. 97,) relates to malicious injuries; the fourth, (c. 98,) comprises forgery; the fifth, (c. 99,) the offences relating to the coin; the sixth, (c. 94,) the doctrine of principals in the second degree and accessories in all these offences; and the last, (c. 94,) is the Repealing Act. While cognate offences have been grouped with sufficient accuracy under distinct Acts of Parliament, the precise form in which they may be reprinted in a separate volume is not of very great importance. It must, at the same time, be admitted that Mr. Archbold's arrangement is strictly logical. The Criminal Laws of this country may be broadly classed under three great divisions, and, according to their relative importance, in this order:—First, offences against individuals—against their persons, their habitations, their property—constituting in substance the bulk of the Criminal Law; secondly, offences against the Queen and her Government; and, thirdly, offences of a public nature, such as offences against public justice and the public peace and the like. Of the two last we have in these happy times but few examples, and the author has, with a good show of reason, thought fit to close the volume with the Statutes relating to those offences which are of comparatively rare occurrence. The Law of Procedure has been left in a very unsatisfactory position, being only partially affected by the Statutes recently passed; and it is not improbable, certainly very much to be desired, that in the course of next Session, a Consolidated Procedure Act will receive the sanction of the Legislature. The Consolidated Acts of last Session contain some alterations in regard to procedure in cases of summary convictions by justices of the peace—these have no force within the metropolitan police district and City of London—whereas, generally, it is enacted that, except as altered by the new Act, procedure is to be regulated by the old law. This has been explained to mean that in indictable offences procedure is not altered by the Statutes; that in the metropolitan police courts and City of London procedure is to remain as heretofore, though the new Act may otherwise direct; and, lastly,

that in summary convictions by justices of the peace, procedure is to be as directed by the new Statutes, if they contain any directions on the subject, and where such directions do not extend, proceedings are to be regulated by Jervis's Act. From this short statement it is quite evident that a new Procedure Act would be a valuable supplement to the Statutes of last Session. Should this be passed, it is to be hoped that Mr. Archbold will publish the same, in such a form, and with such arrangements as to paging and index, as will admit of its being incorporated with the present work.

An Inquiry into the present State of the Law of Maintenance and Champerty, principally as affecting Contracts. By William John Tapp, Esq., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons. 1861.

THE doctrine of our law to which this treatise relates is a branch of the more general rule that a *chose in action* is not assignable. There is this distinction, however, between an assignment of a *chose in action* and a bare right to litigate, that an assignment of the former interest is good in equity, while the latter is invalid; the doctrines relating to champerty and maintenance, however, are strictly construed. Thus, in the recent case of *Cockell v. Taylor*, decided by the Master of the Rolls, it was held that the mortgagee of a fund in Court, "*pendente lite*," even though the object of the mortgagee was to enable the mortgagor to carry on his claim, did not amount to maintenance. In the very recent case of *Anderson v. Redcliffe*, Ell. B. & E. 806, it was likewise held by Lord Campbell that the assignment to the attorney of the subject-matter of the suit *by way of security* did not amount to champerty. These cases show that the doctrines of maintenance and champerty are not greatly favoured by the Courts of the present day. The author would, we think, have acted more judiciously if he had constituted the heading of the second section of his third chapter "What rights are assignable," the leading subject of his treatise, and reviewed the doctrines of maintenance and champerty only in their relation to that more general question. As it stands, the treatise contains a very well written account of the probable origin of those doctrines of the common law, their development by means of statutes, and judicial decisions, and the limitations which those rules have experienced in the more recent cases. This book, owing to its restricted title, is not likely to be as frequently consulted as it deserves. Indeed, it contains a considerable amount of general juristical learning, and some judicious comments on the Statute 8 & 9 Vict. c. 106, and the case of *Hunt v. Bishop*, 8 Exch. 675, (p. 48.) The author has executed his task well, and appears to have been eminently competent to have treated of the law of assignments generally, or some more extensive branch of Jurisprudence than that which he has selected. This manual contains very many interesting comments on various species of assignments. It is on the whole a very creditable

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good table of contents and a copious index. This work is not. Comprising all the authorities on the subject. By Joseph Archbold Esq. London: Butterworths. 1861.

of considerable practical value. It is not exhaustive of the branch of law. As this book was published in 1858 and 1859, it does not discuss the subjects of a belligerent state are contrary to the law only discussed elsewhere in this volume. We only refer to it as present. Persons as well as things could be taken as contraband of war not being a belligerent state, even in cases where the author appears to have some. For instance, in the Preface he ranks the work as practical as possible, compatible with my task of the student, and have adhered closely to those of Sir William Scott, and Kent, and Wheaton." We have the graceful authors to rank in the world have wished that the writer of copied their style. The diction, are very faulty; the arrangement is open to criticism. Like the Sibyls' of method. The author also and with a view for alliteration. *des faits*. We do not object to the recommendation of the author, if he in a new edition. We are it with such a definition of "belligerent war," "the state of war is of war is of naval ten- these. These book, considered of shippers. an article is evidence rather a good table of contents, and seldom to

plement to the Seventh Edition of Oke's Magisterial Synopsis; containing the Criminal Law Consolidation Acts, 24 & 25 Vict. c. 64 to 100, alphabetically and tabularly arranged as in the original work; with a Comparative Table of the Old and New Statutes, and the Alterations. By George C. Oke, Assistant to the Lord Mayor of London, Author of "The Magisterial Digest," "The Law of Turnpike Roads," "A Handy Book of Game and Fishery Laws," &c., &c. London: Butterworths. London: Hodges, Smith, & Co. 1861.

The Supplement to the Synopsis was occasioned by the seven Consolidated Criminal Acts of last Session. These Acts do not apply to offences committed before the 1st of November, 1861. The labours of the Compiler will not, therefore, for a considerable time, be abridged by the passing of these Acts. For the old and new law and procedure there is no better guide than Mr. Oke. *Difficile est communia dicere*. Nevertheless, although his works treat almost exclusively of ordinary and minute details, these are so treated of by him as to indicate the highest practical art on the part of their Compiler. Mr. Coode, in his recent "Letter to Lord Palmerston on the Proposed Consolidation of the Statute Law," seemed to consider the consolidation of the criminal law only to be a piecemeal and feeble proceeding. We are of a different opinion, and think that there are not any branches of Jurisprudence so distinctly characterized as of an integral nature as the ancient divisions of our law into civil and criminal. Treatises, indeed, must, as a general rule, partake of both features of their subject. For instance, we find the law relating to offences against game, in Mr. Oke's "Handy Book on the Game Laws," and also the Synopsis. But such considerations are not so material in point of editorial labour, as is a collation of the criminal law convenient, and in every respect valuable.

The Law relating to Railway Accidents, (including an Outline of the Liabilities of Railway Companies as Carriers generally,) concisely discussed and explained. By Henry Andrews Simon, Esq., of the Inner Temple, Barrister-at-Law. London: N. & R. Stevens, & W. Haynes. 1862.

THE author, as the title of his book indicates, does not confine his view of railway law to the liabilities of such companies in respect to accidents to passengers, but considers, as he informs us in the preface, that "in order to make the work practically useful to the public at large, a brief outline of the rights and liabilities of railway companies as carriers generally is a requisite." There is, however, no greater connexion between the two divisions of this treatise than there is

production, and contains a very good table of contents and a copious index.

**What is Contraband of War, and what is not.** Comprising all the American and English Authorities on the Subject. By Joseph Moseley, Esq., B.C.L., Barrister-at-Law. London: Butterworths. Dublin: Hodges, Smith, & Co. 1861.

THIS manual will be found to be of considerable practical value, inasmuch as it seems to be sufficiently exhaustive of the branch of maritime public law of which it treats. As this book was published prior to the seizure of Messrs. Mason and Slidell, it does not discuss the question whether ambassadors of a belligerent state are contraband of war. As this question is fully discussed elsewhere in this present number of the *LAW MAGAZINE*, we only refer to it at present to show that the notion that persons as well as things could be deemed to be contraband of war does not appear to have suggested itself to writers generally, the phrase contraband of war not being usually applied to subjects of a belligerent state, even in cases where these may be justly punished. The author appears to have somewhat hastily digested his subject. For instance, in the Preface he observes:—"With the object of making the work as practical as possible, I have kept as clear as was compatible with my task of the learned *opinions* of the Jurisprudentists, and have adhered closely to the *decisions* of Judges, especially those of Sir William Scott, and the writings of such men as Story, Kent, and Wheaton." We have always considered these eminent and graceful authors to rank in the class of Jurisprudentists. We should have wished that the writer of the book before us had more closely copied their style. The diction, style, and grammar of this *brochure* are very faulty; the arrangement of the sentences is also open to criticism. Like the Sibyls' leaves, they indicate a great disregard of method. The author also expresses himself very sententiously, and with a bias for alliterations. In a branch of law so *avide des faits*, we do not object to alliterate helps to memory; but we recommend the author, if he undertakes the publication of a second edition, to prepare it with more regard to the graces of composition. We meet with such phrases as "the cabinets of Jurisconsults," "a supplemental war," (p. 1,) "ships and what ships are made from in contraband of war is the same thing." (P. 57.) The author also shows sufficient naval tendencies to personify ships and contraband as friends or foes. These blemishes, however, detract little from the value of the book, considered as a brief exposition of the law of contraband, for the use of shippers. He correctly states (p. 9) that the question whether an article is contraband of war or not is a question of fact and evidence rather than of law. We think that this manual, which contains a good table of contents, will be found to possess practical merit, and seldom to necessitate a reference to the more learned authorities.

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between any branch of toils and the corresponding class of contracts. Moreover, the legal duties of railway companies as insurers do not enter into the considerations of their liability in respect to accidents to passengers. The author gives *in extenso* Lord Campbell's Act, 9 & 10 Vict. c. 93, which was the first invasion experienced by the time-honoured rule "*Actio personalis moritur cum personâ*." He gives a few leading cases upon it. He gives *in extenso* (p. 51) the Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, together with a summary of its provisions, and also the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31. This handy book contains four chapters. The first treats of the liability of railway companies for accidents to passengers generally, and their duties in respect to passenger traffic. The second treats of railways considered as common highways *sub modo*. The third relates to the rights and liabilities of railway companies as carriers. The concluding chapter relates to procedure.

The author attempted to comprise in a small book these extensive branches of law. If he had confined himself to either, there is every reason to think that his work would be exhaustive and valuable; as it stands, it is an insufficient repertory for either division of the subject. This is owing mainly to its size, and not, we think, to its author. It is a tolerably neat *brochure*, and contains a good collection of cases and a copious index. Its incompleteness is the less to be regretted as Mr. Powell, the author of the *Treatise on Evidence*, and Mr. Marshall, have recently published a very excellent work on the general liabilities of railway companies considered as inland carriers.

The Land Drainage Act, 1861; with an Introduction, Practical Notes, and Appendix of Statutes, relating to Drainage; and Forms. By Theodore Thring, of the Middle Temple, Barrister-at-Law. London: V. & R. Stevens, Sons, & Haynes.

CONSIDERING the general importance of the Land Drainage Act of 1861, such a book as this professes to be was much needed, not only as a work of reference for the profession, but also as a guide for landed proprietors and their agents. Mr. Thring prefaces the Statute by a well-written introduction, explanatory of its general purport. The practical notes with which the Act itself is interspersed are concise and to the point; and in the appendix we have a collection of all the Statutes that in any way bear upon land drainage, together with a number of practical forms. As this is a book which ought to be circulated out of the profession, we would have preferred if the index were fuller. Altogether, Mr. Thring has produced a very valuable little book; and the care and learning which he has brought to bear upon the subject are well supported by the beautiful manner in which the printer has executed his part of the work.

**The Doctrine and Practice of Equity ; or, a Concise Outline of Proceedings in the High Court of Chancery, designed principally for the Use of Students.** By George Goldsmith, A.M., of the Inner Temple, Barrister-at-Law. Fifth Edition. London : Butterworths, 7, Fleet Street. 1862.

THIS book has been written expressly for the use of students. For the ordinary pass examination, candidates for the Bar have usually been examined by the Reader on Equity, upon Smith's Manual of Equity Jurisprudence, and the elementary view of the proceedings in a suit in equity by Mr. Hunter. Both are useful test-books ; the one containing a compendious statement of principles, the other a general outline of practice. The excellences of each appear to be successfully combined in Mr. Goldsmith's treatise. Though professedly an elementary work, its merits are greater than its pretensions. This historical outline of the Court of Chancery will be read with pleasure even by those previously well-informed upon the facts. The transitions by which the present elaborate and beautiful system has gradually risen from the ruder contrivances of a primitive age, are delineated in this essay in language that never allows the interest to flag. Though in a literary point of view the introduction may be considered the ornamental part of the work, its principal merit lies in its usefulness. Professing to accomplish a limited task, that task has been well done.

The subtle and profound questions of Equity Jurisprudence are wisely eschewed. By providing the student with a *vade mecum*, the author undertakes to conduct him through a novitiate to more abstruse and minute researches. It is a great misfortune to begin the study of any science at the wrong end. The mind fails to grapple with the deeper principles unless the intellect has previously mastered the more simple rudiments. The knowledge in haste and by piecemeal acquired remains long ill-digested, perhaps through life, crude, and unready. This manual seeks to prevent such a result by introducing to the learner a plain summary of the doctrines of equity, together with a sketch of the practice in the Chancery Courts. "Although we must acknowledge," observes the author, "that many of the topics, if exclusively discussed, would themselves furnish materials for several volumes, yet it is presumed that by an attentive perusal of these few pages submitted to the student's notice, he will be enabled so far to master the leading features of a suit in equity, as not to feel bewildered while engaged in the innumerable points of detail that are more or less incidental to every stage of the proceedings, but which are beyond the design or compass of these pages to anticipate, since many of them are only to be acquired by actual practice and long-trying experience."

Fully one-half of Mr. Goldsmith's book is devoted to an exposition of principles. The equitable jurisdiction of the Court of Chancery in cases of accident, mistake, specific performance, is well explained, not only by the judicious comments of the author, but by reference

to important cases. Passing to the practical part of the work, the reader will find a methodical statement of the main incidents of a Chancery suit, from the filing of the first document to the final decree. While cordially recommending Mr. Goldsmith's treatise to those for whom it was designed, we might be permitted to suggest that it would add to its numerous excellences if an Index of Chapters were inserted along with the present minute General Index of Subjects.

*Treatise on the Law of Arbitration in Scotland.* By John Montgomerie Bell, Esq., Advocate. Edinburgh: T. & T. Clarke. London: V. & R. Stevens. 1861.

*The Law and Practice of Arbitration and Award.* By John Frederic Archbold, Esq., Barrister-at-Law. London: W. H. Bond. 1861.

MR. BELL's volume is a long and able treatise on the Scotch Law of Arbitration. Mr. Archbold's little book seems to be a useful manual for practical purposes on the same branch of law. We offer no further observations at this moment, as we shall probably notice the subject at length in our next number.

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## Events of the Quarter.

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THE death of his Royal Highness the Prince Consort, on the 14th of December last, filled the whole nation with real and deep sorrow, and is justly regarded as one of the heaviest calamities with which Providence could have afflicted the empire. After all that has been said and written on this melancholy subject, it is unnecessary for us to add more than our expression of the profound respect entertained for his late Royal Highness by the legal profession. His strict observance of constitutional principle in a position of singular difficulty, his known admiration of the form of Government happily established in this country, and his deference on all occasions to the law of the land, were, no doubt, in a great measure founded on the acquaintance which Prince Albert made with our Jurisprudence soon after his marriage with the Queen. It is no secret that His Royal Highness at that time read law (as he had previously done at his German University) under the direction of an eminent member of the Bar; and we can hardly doubt that the knowledge thus acquired, aided by his excellent sense, and his innate love of right, served to guide the Prince in the path of public duty. It is worth recording, that when some years ago an ignorant and foolish outcry was raised against the husband of the Sovereign, on the ground that he interfered with the administration of public affairs, a conclusive defence of the course he had pursued was advanced by a body of lawyers; the Law Amendment Society, through their President, Lord Brougham, having published a statement of the expediency, and indeed the necessity, for the presence of such a counsellor beside the throne.

His Royal Highness the Prince of Wales opened the new library of the Middle Temple on the 30th of October, and was enrolled a Bencher of the Inn. The library was originally founded in 1641, and contains at the present time between 15,000 and 16,000 volumes. The first stone of the new building was laid in 1858, by Sir Fortunatus Dwaris, the architecture being after the style of the fifteenth century. The proportions of the library itself are 96 feet long, 42 wide, and 70 feet high, and the approach is by a winding staircase in an octagonal tower by the side. His Royal Highness was received by the Treasurer, Mr. Anderson, Q.C., and his Attorney-General, Sir William Alexander, Q.C., and conducted to the Parliament Chamber, where the Benchers and other representatives had the honour of being presented in due form.

A Parliament being formed, the Master Treasurer moved, and the Lord Chancellor seconded, "That his Royal Highness be admitted a member of the Middle Temple," and next, "That His Royal Highness be called to the degree of the outer Bar, and that the oath on publication of the call be dispensed with," and, "That his Royal Highness be invited to the Bench." These motions having been carried unanimously, the Prince assumed the Benchers' gown, and took his seat on the right of the Treasurer. The next motion dissolved the Parliament, and the Prince, accompanied by the Treasurer, the Lord Chancellor, the Duke of Cambridge, and the Benchers, was conducted to the new library, where he took his station on the dais in the bay window. The Treasurer then read the following address :—

"May it please your Royal Highness,—We, the Treasurer and Masters of the Bench, barristers, and other members of the Society of the Middle Temple, gladly avail ourselves of this opportunity to express our warmest thanks for the honour which has been conferred on this society by your Royal Highness having graciously consented to become one of our members and to preside at the opening of the new library.

"This ceremony cannot fail to interest all who duly appreciate the importance of the study of juridical science, and the diffusion of a knowledge of the laws which govern alike all ranks and orders of society, and who deem that the maintenance of its learning, no less than the preservation of its independence, is essential to the efficient administration of justice and to the protection of the liberty of the subject.

"The library in which we are assembled, built for the purpose of providing the members of this Inn with improved opportunities of study, may be regarded as an earnest that the Masters of the Bench take a deep interest in the exertions of the student, and are anxious to encourage a spirit of generous rivalry for the honours which have been set apart as rewards of merit.

"It is not, we trust, presumptuous to hope that, among those who may pursue their studies in this room, many will be found not unworthy successors of those great lawyers and statesmen to whose names, enrolled in the books of our society, and many of which grace these walls, we refer with legitimate pride.

"We recognise in the honour which your Royal Highness has this day conferred upon us a manifestation of that respect for the law for which your Royal House has always been distinguished, and never more so than during the happy reign of Her Most Gracious Majesty—a reign specially marked by the many important improvements in our laws—and we feel assured that the enrolment of your Royal Highness as one of our body will animate us all with fresh zeal ever to uphold the dignity of the profession and to maintain the high character of our ancient society."

To which his Royal Highness read the following reply in a clear, firm tone, which, notwithstanding its crowded state, was audible nearly all over the room :—

"Gentlemen,—I thank you most cordially for this address and for the gratifying terms in which you refer to my presence here to-day.

"I have gladly accepted your invitation, and esteem it a high privilege to be enrolled on your list of Benchers, and permitted to inaugurate the opening of this beautiful library, so worthy of your ancient and renowned society.

"Although but very imperfectly acquainted with the noble science to the study of which this edifice is more specially devoted, I am deeply sensible of its vast interest and importance, and I value, as they deserve, the learning and integrity for which the Bench and Bar of this country are so justly celebrated.

"Your Inn has contributed many to the long array of illustrious names which adorn our legal annals ; and, while heartily congratulating you on the completion of this great work, I venture to express a fervent hope that the students within its walls may largely profit by the advantages so wisely and liberally provided for them, and may successfully emulate the fame of their eminent predecessors."

The Prince then signified his pleasure to the Treasurer that the library be opened, and the Treasurer then said, "By command of his Royal Highness this library is declared to be opened."

His Royal Highness then proceeded to the Temple Church, and afterwards returned to a *déjeuner* at which about 750 guests were present. The usual loyal toasts having been drunk, the Prince rose and said, "Gentlemen, I wish all prosperity to the profession, and I beg leave to give you 'Domus,' " which was drunk with enthusiasm. His Royal Highness shortly after retired.

The students of the Middle Temple have presented a testimonial to James Anderson, Esq., Q.C., on the occasion of his retirement from the office of Treasurer, at the close of his year of office. It consisted of a silver inkstand, which was surmounted by the emblem of the Middle Temple, and bore the arms of the Middle Temple and of Mr. Anderson ; also the following inscription :—

"Jacobum Anderson, Armigerum  
Conciliar. Regin. thesaurarium,  
Studentes Medii Templi,  
Beneficiorum memores,  
Hoc donaverunt.

A.D. 1861."

The seizure of the two Confederate Commissioners on board the mail packet steamer *Trent* is fully treated of in another portion of our present number. The Windham case, the *cause celebre* of the day, is still unfinished as we go to press. We shall probably allude to this remarkable trial at some length in our next number.

## APPOINTMENTS.

The Queen has been pleased to appoint the Right Hon. Sir John Romilly, the Right Hon. Lord Justice Blackburn, the Right Hon. Chief Justice Monahan, the Right Hon. Abraham Brewster, the Right Hon. Joseph Napier, Vice-Chancellor Sir W. Page Wood, Mr. Justice Willes, Mr. Baron Hughes, the Attorney-General for England, the Attorney-General for Ireland, the Solicitor-General for England, the Solicitor-General for Ireland, Sir Hugh Cairns, George Markham Giffard, Esq., Q.C., Robert Bayley Follett, Esq., and Richard J. Theodore Orpen, Esq., to be Her Majesty's Commissioners, to inquire into the following matters, with a view to reduce costs to suitors and the expenditure of the public money, and to assimilate so far as may be practicable the administration of justice in England and Ireland:—

1. The constitution, establishment, practice, procedure, and fees, of the Superior Courts of Common Law in Ireland.

2. The difference between the constitution and the forms of practice, procedure, and fees, of the Courts of Chancery of England and of Ireland.

The Committee is divided into two sections, one sitting in London and the other in Dublin. Mr. W. Neilson Hancock, LL.D., formerly Professor of Jurisprudence in the Queen's College, Belfast, and Secretary to the University Commission, and to the Endowed Schools Commission, and Mr. H. R. L. Vaughan Johnson, of Lincoln's Inn, and some time principal Secretary to the late Lord Campbell, have been appointed Secretaries to the Commission.

The Queen has also been pleased to appoint the Right Hon. Sir John Romilly, Right Hon. Chief Justice Erle, Right Hon. Sir Edward Ryan, Right Hon. Robert Lowe, Hon. Mr. Justice Willes, and John Macpherson Macleod, Esq., to be Her Majesty's Commissioners for preparing a body of substantive law for India, and for considering and reporting on such other matters in relation to the reform of the laws of India as may be referred to them by Her Majesty's Secretary of State for India.

Upon the retirement of Mr. Justice Hill from the Bench, Mr. John Mellor, Q.C., was appointed one of the Judges of the Court of Queen's Bench.

Mr. H. R. Bagshawe, Q.C., has been appointed Judge of County Court Circuit No. 31, in lieu of John Johnes, Esq., resigned.

In the room of the late Mr. Nathaniel Ellison, Mr. T. B. H. Abrahall has been appointed a Commissioner in Bankruptcy, for the Newcastle-upon-Tyne District.

Mr. W. M. Hindmarch, of the Northern Circuit, has been appointed Attorney-General for the County Palatine of Durham, in the room of Mr. R. Ingham, M.P., resigned.

Mr. J. B. Aspinall, of the Northern Circuit, has been appointed Recorder of Liverpool, in the room of the late Gilbert Henderson, Esq., Q.C., deceased.

Mr. Serjeant Hayes, of the Midland Circuit, has been appointed Recorder of Leicester, in the room of Mr. Justice Mellor.

Mr. Henry Philip Roche, Barrister-at-Law, of Lincoln's Inn, has been appointed one of the Registrars of the Court of Bankruptcy, in the place of Mr. T. B. H. Abrahall, promoted.

The curators of the patronage of the University of Edinburgh have elected Mr. George Ross, advocate, to the Chair of Scots Law, vacant by the death of Professor More.

At a pension of the Honourable Society of Gray's Inn, the Rev. Alexander Taylor, M.A., fellow of Queen's College, Oxford, was elected to the office of chapel reader and afternoon preacher of the society, vacant by the decease of the Rev. W. H. Hart.

The Rev. John Stewart Perowne, M.A., Fellow of Corpus Christi College, Cambridge, and Johann Fried Christoph Muncke, Doctor of Philosophy in the University of Leipsic, have been appointed Special Examiners, under the provisions of the Attorney's and Solicitor's Act, of 1860. The first examination will take place on the 10th and 11th February.

The Lord Chancellor has appointed Mr. W. W. Aldridge, of the firm of Messrs. Aldridge & Bromley, to act as the attorney in the case of all bankrupts who are confined in prison, and apply in *formâ pauperis* for their discharge.

IRELAND.—Mr. F. W. Brady, Q.C., of the Irish Bar, has been appointed to the Chairmanship of the King's County consequent upon the retirement of Mr. Corballis from the County Judgeship of Dublin.

The Attorney-General of Ireland has appointed Mr. Pierce Kelly local Crown Solicitor for the County and City of Waterford.

ALEXANDRIA.—Mr. Albany Fonblanque, of the Middle Temple, has been appointed Her Majesty's Legal Vice-Consul and Registrar at Alexandria.

AUSTRALIA.—Mr. Butler Cole Aspinall has been appointed Attorney-General at Melbourne, Australia.

CALCUTTA.—Mr. William Ritchie, Advocate-General and Leader of the Calcutta Bar, has been appointed legal member of the Supreme Council.

CORFU.—The Queen has been pleased to confer the honour of knighthood upon Mr. Patrick MacCombaich Colquhoun, LL.D., member of the Legal Council of Corfu, who will act as Chief Justice of that island during the present year.

INDIA.—Mr. M. A. G. Shawe has been appointed Civil and Sessions Judge of Purneah, in the room of Mr. H. C. Halkett, appointed Judge at Rungpore. Mr. F. Tucker has been appointed to the Bench at Purneah in the place of Mr. M. A. G. Shawe.

TOBAGO.—Mr. Henry K. Woodcock has been appointed Chief Justice of the Island of Tobago.

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## CALLS TO THE BAR.

*Michaelmas Term, 1861.*

**INNER TEMPLE.**—Henry Pendock, Esq.; St. George Tucker, Esq.; William Gerrard Lysley, Esq., M.A.; John Pope Hennessy, Esq., M.P.; Richard Roupell, Esq.; Henry Charles Ross Johnson, Esq.; William Bayley Heath, Esq., B.A.; Robert Draper Johnson, Esq., B.A.; William Joseph Rudge, Esq.; William Carew Hazlitt, Esq.; Herbert George Denman Croft, Esq., B.A.; and Stanley Leighton, Esq.

**LINCOLN'S INN.**—Lewis Morris, jun., Esq., M.A., (Certificate of Honour, First Class;) Edmund Wyndham, Esq., B.A.; William Edward Hall, Esq., M.A.; Charles Bertie Pulleine Bosanquet, Esq., M.A.; George Tyrrell, jun., Esq., B.A.; Samuel Hess Behrend, Esq., M.A.; Hugh Barklie Blundell McCalmont, Esq., B.A.; Edward Christopher Corballis, Esq., B.A.; Anthony John Anstruther Wilkinson, Esq., B.A.; Edmund Story Maskelyne, Esq., B.A.; Henry Brougham Miller, Esq.; Edward Thurstan Holland, Esq., B.A.; and William Lethbridge, Esq., M.A.

**GRAY'S INN.**—Joseph Burgin, Esq.; and William Nicholson, Esq.

**MIDDLE TEMPLE.**—William Bradford, Esq.; Walter Shelley, Esq.; Herbert Cowell, Esq.; John Cashel Hasy, Esq.; and Charles Philip Cooper, Esq.

*Hilary Term, 1862.*

**LINCOLN'S INN.**—Henry Ludlow, Esq., B.A., (holder of the Studentship of Hilary Term, 1861;) Charles Carleton Massey, Esq., (Certificate of Honour, First Class;) John Ignatius Williams, Esq., B.A.; Arthur Pemberton Lonsdale, Esq., B.A.; James Dearden, Esq.; Sackville Davis, Esq.; James Clayfield Clayfield Ireland, Esq., M.A.; William Holding, Esq., B.C.L.; William Fletcher Atkinson, Esq., B.A.; Francis Cowley Burnard, Esq., B.A.; Henry Thomas Salmon, Esq., M.A.; Robert Harrop, Esq., M.A.; Joseph Hobbs, Esq., B.A.; John Edwin Hilary Skinner, Esq.; Douglas Parry Crooke, Esq., B.A.; Edward Thomas Smith, Esq., B.A.; William Fox Hawes, Esq., B.A.; Thomas Calthorpe Blofeld, Esq., B.A.; William Barber, Esq., M.A.; and Thomas Berwick, Esq.

**INNER TEMPLE.**—Thomas Minchin Goodeve, Esq., M.A.; Arthur Charles, Esq., B.A. (Certificate of Honour, First Class;) George Phillips, Esq. (Certificate of Honour, First Class;) Clement Francis Cornwall, Esq., B.A.; David John Vavasor Durell, Esq.; William Alexander Dumaresq, Esq., B.A.; Percival Henry Wormald, Esq., B.A.; Marston Clarke Buzzard, Esq., B.A.; William Cecil Pardoe Purton, Esq.; Charles Owen, Esq.; John Lloyd Wharton, Esq., B.A.; William Graham, Esq., B.A.; Arundel Rogers, Esq.; Charles Mathew Clode, Esq.; Henry William Edge, Esq.; William Ralston Shedden Ralston, Esq., B.A.; and Mark John Stewart, Esq., M.A.

**GRAY'S INN.**—Thomas Green, Esq.; Hugh Cowie, Esq., M.A.; and Thomas Newton, Esq.

**BAR EXAMINATION.**

At the public examination of the students of the Inns of Court, held at Lincoln's Inn Hall, on the 30th and 31st October, and the 1st November, 1861, the Council of Legal Education awarded to Thomas Maguire, Esq., a studentship of fifty guineas per annum, to continue for a period of three years. To Herbert Hardy Cozens-Hardy, Esq., Arthur Charles, Esq., and James Thomas Jeffrey, Esq., certificates of honour of the first class ; and to Percy William Bunting, Esq., Marston Clarke Buzzard, Esq., William Barber, Esq., Henry Mason Bompas, Esq., Francis Nethersole Cates, Esq., Lewis Pugh Evans, Esq., Francis William Rowsell, Esq., David John Vavasor Durell, Esq., Decimus Sturges, Esq., Howard Warburton Elphinstone, Esq., John Pope Hennessy, Esq., M.P., Thomas Newton, Esq., Francis Phipps Onslow, Esq., John Charles Bethune, Esq., certificates that they have satisfactorily passed a public examination.

And at the examination held on the 8th, 9th, and 10th January, the Council awarded to Herbert Hardy Cozens-Hardy, Esq., of Lincoln's Inn, a studentship of fifty guineas per annum, to continue for a period of three years. To John Forbes, Esq., George Phillips, Esq., and Arthur Wilson, Esq., certificates of honour of first class ; and to Jason Smith, Esq., William Holding, Esq., Thomas Green, Esq., Edward Alfred Hadley, Esq., Matthew Henry Starling, Esq., Charles Edward Fox, Esq., John E. Meek, Esq., John Kinghorn, Esq., Edward Thomas Smith, Esq., Thomas Hudson Jordan, Esq., certificates that they have satisfactorily passed a public examination.

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**EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.**

*Michaelmas Term, 1861.*

At the examination of candidates for admission on the roll of attorneys and solicitors of the superior courts held this Term, the examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinctions :—

James Richardson Pearless, aged 22 ; Herbert Henry Cornish, aged 21 ; John Till Walter, aged 21 ; Arthur Lindo, aged 22.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books :—

To Mr. Pearless the prize of the Honourable Society of Clifford's Inn ; to Mr. Cornish, Mr. Till, and Mr. Lindo, each one of the prizes of the Incorporated Law Society.

The examiners also certified that the following candidates passed examinations which entitle them to commendation :—Thomas Ferguson Ansdell, aged 23 ; Francis Ross Greatwood, aged 22 ; William Frederick Gush, aged 22 ; Robert Harding Milward, aged 23.

The Council accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to prizes or certificates of merit, if they had been under the age of 26 :—John Holmes, aged 30 ; Charles Henry Wiltshire, aged 28 ; Thomas Edelston, aged 31.

The number of candidates examined in this term was 104 ; of these, 92 were passed and 12 postponed.

## *Necrology.*

### *October.*

- 28th. NUTT, JOHN, Esq., Solicitor, aged 69.

### *November.*

- 7th. SMITH, GEORGE, Esq., Solicitor, aged 75.  
 12th. FOX, RICHARD, Esq., Solicitor, aged 70.  
 13th. BLEAYMIRE, WILLIAM, Esq., Solicitor, aged 47.  
 19th. CARTER, WILLIAM GEORGE, Esq., F.S.A., Solicitor, aged 75.  
 20th. RAVEN, SAMUEL, Esq., Solicitor, aged 67.  
 20th. TRESIDDER, NICHOLAS JOHNIE, Esq., Solicitor, aged 80.  
 25th. CROSS, WILLIAM, Esq., Solicitor, aged 58.  
 30th. GILCHRIST, ALEXANDER, Esq., Barrister, aged 35.

### *December.*

- 2nd. HICKS, PETER EDWARD, Esq., Solicitor.  
 5th. HENDERSON, GILBERT, Esq., Q.C., Recorder of Liverpool.  
 9th. ROWLEY, YOUNG LLOYD, Esq., Barrister, aged 43.  
 12th. ELLISON, NATHANIEL, Esq., One of Her Majesty's Commissioners in Bankruptcy, aged 76.  
 12th. LEE, EDWARD STEPHEN, Esq., Solicitor, aged 42.  
 13th. BOLTON, THOMAS WHALLY, Esq., Solicitor, aged 65.  
 13th. MCMAHON, JAMES, Esq., Barrister, aged 80.  
 18th. HUMPHRY, JOSEPH, Esq., Q.C., aged 66.  
 21st. TUCKER, CHARLES BENJAMIN, Esq., Solicitor, aged 82.  
 28th. WHITLEY, JOHN, Esq., Solicitor, aged 67.  
 28th. INGRAM, FREDERIC, Esq., Solicitor, aged 36.  
 30th. THOMAS, WILLIAM JOSEPH, Esq., Solicitor.  
 31st. WILSON, JOHN, Esq., Barrister, aged 64.  
 31st. MARR, EDWARD, Jun., Esq., Solicitor, aged 26.

*January.*

- 6th. GABRIEL, JAMES A., Esq., Solicitor, aged 42.
- 7th. MAY, THOMAS, Esq., Solicitor, aged 56.
- 13th. COOPER, JOHN NEWLAND, Esq., Solicitor, aged 29.
- 14th. SUTCLIFFE, RICHARD CLEGG, Esq., Solicitor, aged 37.
- 15th. PAYNE, GEORGE, Esq., Solicitor, aged 40.
- 17th. ALNUTT, CHARLES BLAKE, Esq., Barrister, aged 70.
- 19th. BRANSCOMBE, WALTER, Esq., Solicitor, aged 64.
- 24th. RIGBY, TIPPING THOMAS, Esq., Recorder of Wallingford, aged 88.

## *List of New Publications.*

*Archbold*—The Consolidated Criminal Statutes of England and Ireland, passed in the last Session of Parliament ; with Notes, Forms of Indictments, and Evidence. By J. F. Archbold, Esq., Barrister. 12mo., 21s. cloth.

———The Law and Practice of Arbitration and Award ; with Forms. By J. F. Archbold, Esq., Barrister. 12mo., 5s. cloth.

———General Orders and Forms of the Court of Bankruptcy and the County Courts, 1861 ; forming a Supplement to the first edition of Archbold's Law of Bankruptcy and Insolvency. 12mo., 1s.6d. sewed.

———The Practice of the New County Courts ; including the Practice under the new Bankruptcy Statute, 24 & 25 Vict. c. 134. By J. F. Archbold, Esq., Barrister. Eighth Edition. 12mo., 12s. cloth.

*Ayckbourn*—Practice of the High Court of Chancery, as altered by recent Statutes. By H. Ayckbourn. Seventh Edition. Royal 12mo., 21s. cloth.

*Brandon*—A Treatise upon the Customary Law of Foreign Attachment, and the Practice of the Mayor's Court of London therein ; with Forms of Procedure. By W. Brandon, Esq., Barrister. 8vo., 14s. cloth.

*Browning*—The Practice and Procedure of the Court for Divorce and Matrimonial Causes : with Forms of Practical Proceedings ; the Acts, Rules, and Orders ; Tables of Fees and Bills of Costs. By W. E. Browning, Esq., Barrister. Post 8vo., 8s. cloth.

*Clark*—The Trent and San Jacinto ; being the substance of a Paper on this subject read before the Juridical Society on December 16, 1861. By C. Clark, Esq., Barrister. 8vo., 1s. sewed.

**Daly**—Handy Book of the Practice in the Lord Mayor's Court in Ordinary Actions and in Foreign Attachment. By D. B. Daly, Esq., Barrister. 12mo., 5s. cloth.

**Doria and Macrae**—The Law and Practice in Bankruptcy under the Provisions of the Bankrupt Law Consolidation Act, 1849, as amended by subsequent Statutes ; including the General Orders and Forms of Procedure. By A. A. Doria and D. C. Macrae, Esqs., Barristers. Vol. I. 12mo., 15s. boards.

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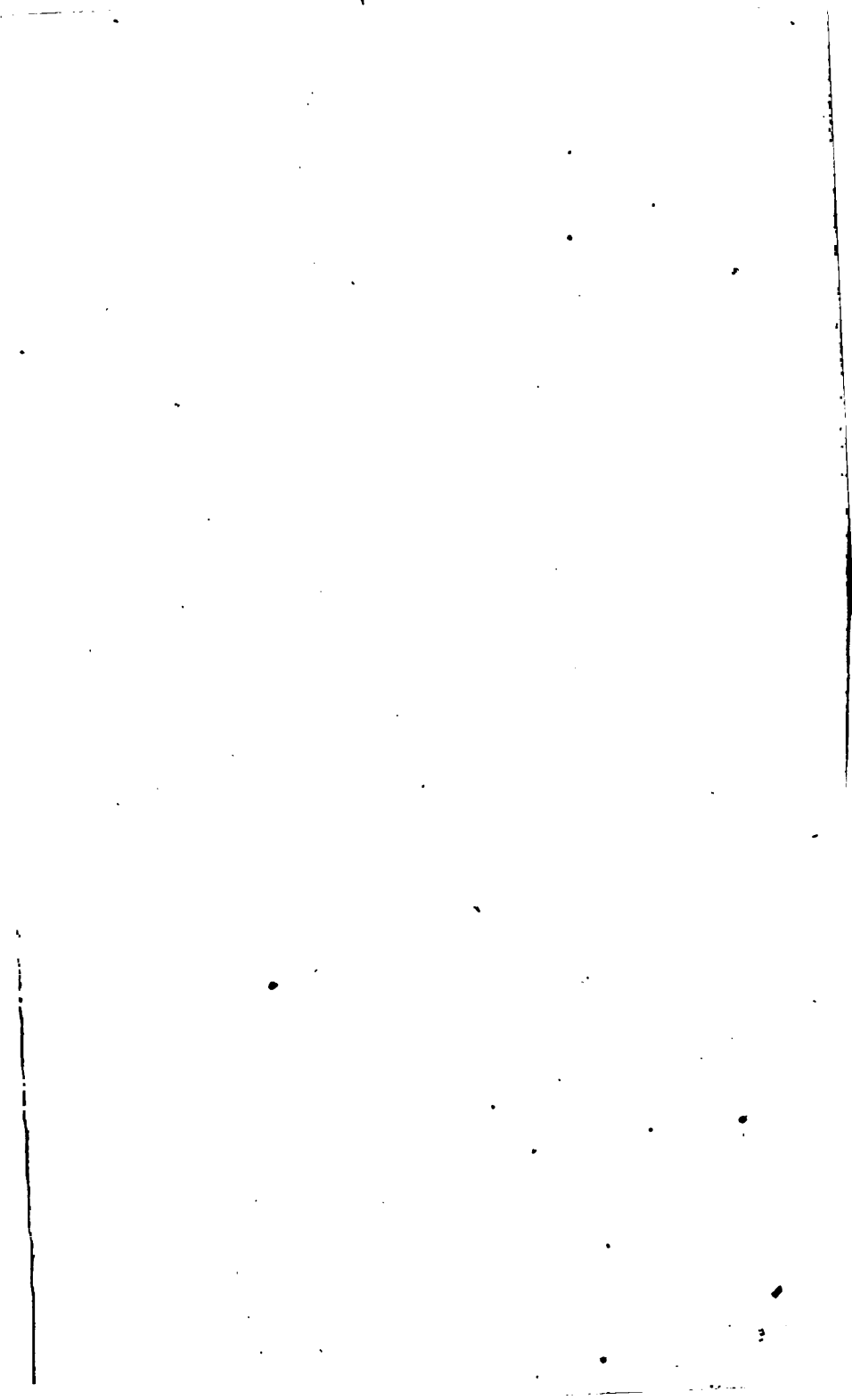
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